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ANNE C. DAILEY

Law and the Unconscious

A Psychoanalytic Perspective

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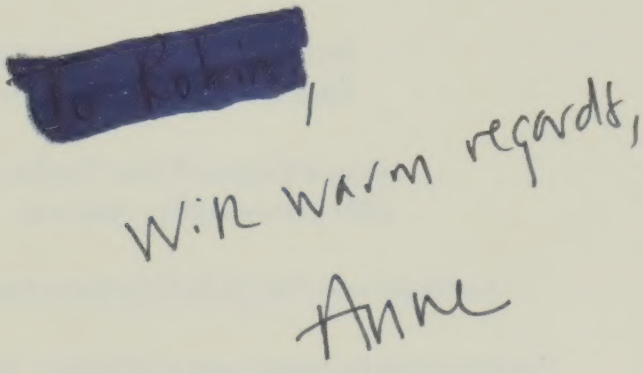

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For Sarah, Sam, and Steve

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LAW AND THE UNCONSCIOUS

Introduction

The height of psychoanalytic thinking in law was the 1967 publication of the treatise *Psychoanalysis, Psychiatry and Law* by Jay Katz, Joseph Goldstein, and Alan Dershowitz. With small print running more than eight hundred pages long, this magisterial volume embodied the authors' sweeping aspiration to investigate law from a sophisticated psychoanalytic perspective. Yet there is an odd moment in this book, right at the beginning, when the authors set out the overall purpose of their project. Here they write, "The materials are designed to present a detailed study of psychoanalytic theory and to explore its relevance, *if any*, to law."[1] What does it mean that these eminent scholars, so supremely knowledgeable in both disciplines, interjected this strangely self-undermining disclaimer right at the start of their momentous work? The "if any" signifies a truly analytic moment in a book dedicated to psychoanalytic understanding: a moment of self-doubt; a signal of underlying anxiety and conflict; a warning that the following eight hundred pages might come to nothing. What we do here is for naught!

As always, however, there is another way to interpret the meaning of this textual symptom. "If any" can be read as a demonstration of the authors' foundational thesis, a momentary slip that itself poignantly dramatizes the significance of unconscious life in all spheres of human activity, including the law. Psychoanalysis teaches us that we are in large part opaque to ourselves, that our inner lives are accessible only indirectly through symptoms and hesitations and dreams. Consciously we experience ourselves as rational beings. We need and want to think of ourselves as knowing, integrated, consistent, purposeful individuals. On a day-to-day basis, we depend heavily on the idea of a coherent, unified self in order to function in the real world. But unconscious life inevitably disrupts our settled view of ourselves.

Despite our self-conception as rational actors, we are in fact unknowing, conflicted, wishful, self-undermining creatures. We have unconscious anxieties, fears, and motivations. We hesitate without knowing why. We act impulsively against our better judgment. Beneath our well-dressed, seamless exteriors lie the naked conflicts and passionate longings of unconscious life. Thus a crack is revealed in the surface confidence of a magisterial volume on law and psychoanalysis through the small opening provided by the words "if any." We uncover an entire theory of psychological life in the operation of these two unsettling words.

Law resists this psychoanalytic understanding of the self. It relies on a presumption of rationality, by which I mean simply a presumption that individuals consciously understand and control what they say and do. The law's presumption of rationality exists as part of a broader liberal legal framework encompassing a set of related concepts such as free will, autonomous choice, and personal agency. Working within this rationalist framework, law presumes that, absent insanity or other extenuating circumstances, individuals are freely choosing subjects who generally act on the basis of known beliefs and desires. Law cares little, if at all, about our unconscious motives. It operates "as if" we are rational beings, staying at the surface level of behavior and words. We largely have Justice Oliver Wendell Holmes Jr. to thank for that. Holmes developed the idea of the "reasonable person" in his 1881 book *The Common Law*. Holmes was well aware of the cauldron of forces lying beneath conscious awareness, but he made the pivotal decision that the law should regulate, judge, and govern with reference to an individual's objective behavior rather than subjective state of mind. And we have been living with Holmes's decision ever since.

Perhaps we owe a debt of gratitude to Holmes. For how does any liberal system of justice committed to the rule of law and individual freedom accept psychoanalytic insights? How can law take the powerful forces of the unconscious into account and still pass judgment, still hold people accountable for their acts, still rely on what people say and do for clues to their real intentions? Law's dogged resistance to the reality of unconscious life certainly reflects a stubborn denial of human irrationality. But law's resistance to unconscious life may also reflect a pragmatic concern that any workable

system of law requires the legal fiction that people consciously intend what they say and do. Otherwise, we fear, chaos will ensue as guilty defendants are let free, contracts are unenforced, obligations remain unmet, and wrongs go unremedied. The law declares itself unanalyzable on pragmatic as well as ideological grounds.

Yet at the very moment when the authors of the magisterial treatise on psychoanalysis and law had the opportunity to proclaim *with certitude* that these prevailing views are wrong, that the legal presumption of rationality does not reflect reality or make law operable, but instead perpetuates ineffective, unrealistic, and unjust legal rules, often with disastrous consequences, these authors hesitated. Their doubt presaged the failure of their own ambitions. Over the last half century, the unsettling "if any" has overshadowed the ensuing eight hundred pages demonstrating in painstaking detail the relevance of a psychoanalytic approach to law. At the start of the twenty-first century, the legal fiction of rationality remains perilously intact.

This book revives the Katz, Goldstein, and Dershowitz project without the fateful hesitation: the aim of this book is to establish the relevance of psychoanalysis to law. The task of bringing psychoanalytic insights to law may come across as naive, given the tarnished reputation of Freudian psychoanalysis in twenty-first-century American culture. But we will see how the contemporary teachings of psychoanalysis—both as a theory of mind and as a clinical practice—can help us modify and improve the legal system's structuring assumptions about who we are and what we can know about our own and other people's minds. As with other fields, such as history and economics, psychoanalysis provides a body of knowledge that serves as an interdisciplinary tool to help us study how law can and should regulate human behavior and adjudicate legal liability.

The project is of urgent importance. Psychoanalysis reveals how law's failure to take human subjectivity seriously poses grave risks for a liberal system of justice committed to just treatment and fair outcomes. Rational actors and reasonable persons are legal fictions that allow us to avoid confronting the everyday irrationality of ordinary people caught up in the legal system, those whose actions contradict conscious preferences or beliefs, or are patently self-destructive or incomprehensible. The law's denial

of these ordinary manifestations of human irrationality can have punitive, even disastrous consequences for accused individuals who give false confessions, for abused partners who "choose" to stay with their abusers, for parents wrongly denied the custody of their children, for victims of date rape who do not fight back, and for many others swept up into the machinery of the law. The presumption of rationality launches a forceful assault upon individuals genuinely unaware of their real intentions or the real-world consequences of their conduct. In deepening and complicating the law's conception of the individual, psychoanalysis helps us to see the dark underside to law's rationalist ambitions. It forces us to question whether a liberal legal system that fails to recognize the existence of ordinary irrationality sacrifices its claims to individual fairness and systemic justice.

The psychoanalytic approach taken here revives a once-vibrant tradition of psychoanalytic thinking in law going back to the early twentieth century. As chapter 2 describes, early-twentieth-century legal thinkers applied Freudian ideas to issues as varied as freedom of speech, criminal responsibility, judicial decision-making, and child custody. Clarence Darrow first brought psychoanalytic ideas directly into the criminal courtroom in 1924 during the sentencing phase of the infamous case of the young murderers Leopold and Loeb. Jerome Frank applied psychoanalytic ideas to judicial decision-making in his well-known 1930 book, *Law and the Modern Mind*. By the mid-twentieth century, psychoanalytic ambitions in law were soaring. Psychoanalysts shaped debates over the insanity defense in the Model Penal Code; psychoanalytic insights made their way into legal opinions; and psychoanalysts were appointed to the faculties at both Harvard and Yale Law Schools.[2] Joe Goldstein brought Sigmund Freud's daughter Anna, a prominent child psychoanalyst in her own right, to Yale Law School to coauthor a series of pathbreaking psychoanalytic books on child custody.[3] The 1967 publication of the Katz, Goldstein, and Dershowitz treatise on law and psychoanalysis appeared to be definitive proof that psychoanalysis was on its way to answering law's call for a workable and comprehensive theory of mind. It was a triumphal story, or so it seemed.

But as we know, psychoanalytic ambitions fell hard, and quickly. Signs of the collapse of psychoanalytic thinking in law had been there all along.

Many legal thinkers had resisted the seemingly radical implications of psychoanalysis for criminal responsibility. Some argued that the principles of psychoanalysis were suitable for psychiatric treatment but not the law. Even the daring authors of the momentous treatise on law and psychoanalysis let slip their own reservations. But most devastating of all were the forces external to law that gathered steam post mid-century to launch their own attack on psychoanalysis. Cognitive psychology rose to prominence in the 1970s, overshadowing psychoanalytic theory and treatment. The 1980 edition of the handbook of American psychiatry, the DSM III, eliminated many of the earlier psychoanalytic diagnostic criteria.[4] Managed care abolished insurance reimbursements for psychoanalytic treatment, and five days a week on the couch became seen by many as a self-indulgent luxury of the privileged rather than a practical treatment for real illness. The backlash against Freud heated up as critics decried his homophobia, sexism, and tolerance for child sexual abuse. Media headlines pronounced the death of Freud; a *Time* magazine cover ominously depicted his head broken open.[5] Scientific psychology burst forth with breakthroughs in neuroscience, genetics, and medication, promising shorter, cheaper, and more-effective treatments for mental illness. The collapse was hastened by the psychoanalytic profession's own arrogance, overreaching, and aversion to scientific research, which left its adherents ill-equipped to deal with these hostile forces.

In light of this recent history, it might seem that psychoanalysis is the last place where law should look for useful and reliable insights into human nature. Yet closer inspection yields the opposite conclusion. While Freud may be long dead, many of his most important ideas indisputably live on. Some of Freud's major theories have not withstood the test of time, including women's underdeveloped superegos and homosexuality as a developmental arrest. But despite his sometimes serious missteps and unfortunate cultural biases, Freud revolutionized psychology in lasting ways. His ideas so altered our intellectual and cultural landscape that it is difficult to find any area of Western culture left untouched by his influence. Freud did not discover the unconscious, but he was the first to understand the dramatic effects worked by unconscious processes on conscious thinking. Many of his ideas permeate our common vocabulary: defense, projection, repression, libido, Oedipal

conflict, anal compulsiveness, free association. His method of treatment gave birth to the still-thriving field of clinical "talk therapy" and raised an entire generation on the value of self-reflection to psychological well-being. As W. H. Auden observed upon Freud's death in 1939, Freud "is no more a person now but a whole climate of opinion," and he remains so today, however underappreciated.[6] Freud's psychoanalytic discoveries have fundamentally altered our understanding of ourselves and other people.

Freud's lasting influence on American culture, however, is not what makes psychoanalysis so vitally relevant to law today. Rather, *contemporary psychoanalysis* deserves our attention for the contribution it can make to legal doctrine and theory. While contemporary psychoanalysis builds upon Freud's foundational body of work, its relationship to Freudian ideas is much like the relationship of modern physics to Newtonian theory. Critics may scorn classical psychoanalysis for its preoccupation with castration anxiety, penis envy, and the primal scene, but those critics seem unaware that such outdated Freudian concepts no longer occupy psychoanalysts' attention. Psychoanalysis has evolved greatly over the decades, leaving behind—as it naturally should—some of the misguided early thinking of the founders, perhaps most important, their ideas about women, gender, and sexuality. Nevertheless, many of Freud's most important ideas pertaining to the fundamentals of the human mind—the dynamic unconscious, psychic determinism, repression, transference, and the lasting effects of early trauma—have carried forward, and rightly so, into contemporary psychoanalysis.

Of course, the contemporary field of psychoanalysis comprises a number of different schools with varying theoretical orientations and clinical approaches. Ego psychologists, object relations theorists, self psychologists, attachment theorists, and relational psychoanalysts work with differing conceptual frameworks. Yet for present purposes, we can identify an overarching trend in modern psychoanalysis away from Freud's classical framework of instinctual drives and inner conflict toward a conceptual paradigm that foregrounds relationships with others, past and present.[7] While Freud's classical theory posited instinct and defense as the core structuring features of the mind, contemporary psychoanalysts highlight the importance of relationships in constituting, regulating, and informing psychic structure and

operations. Most important, object relations theorists focus on the way in which internal representations of relationships with early caregivers color our experience of other people and the world. These analysts, as well as others, have expanded Freud's reach by studying early attachment, preverbal experiences, adaptation to the world, the concept of the self, interpersonal relations, and personal narrative. We see in contemporary psychoanalysis countless developments in traditional concepts such as repression, sexuality, and unconscious guilt; in the role of culture, internalization, and intergenerational trauma; in character traits such as narcissism; and in interpersonal phenomena such as transference and projective identification. Most of these contemporary psychoanalysts work to some degree with the relationship between analyst and patient in the here and now of the clinical setting.

While the object relations turn in psychoanalysis constitutes a major intellectual innovation in psychoanalytic thinking over the past century, classical ideas about the mind—Freud's major contributions—still endure. Let us consider how old and new converge in this contemporary psychoanalytic portrait of the mind. In addition to recognizing the role of relationships in shaping the individual's psychological makeup and orientation to the world, contemporary psychoanalysts work with Freud's foundational idea of the dynamic unconscious, that is, the arena of feelings and ideas that are kept out of awareness *for a reason*, usually because experiencing them directly would cause anxiety or suffering. The dynamic unconscious captures the notion of a mind in motion: sexual drives and aggressive urges moving us to action; psychological mechanisms of defense that work to repress these unruly inner forces; desires and fantasies that come into conflict with each other and with our conscious sense of ourselves. We deploy elaborate self-deception techniques to resist knowing this side of ourselves; repression (keeping thoughts and feelings out of conscious awareness) and resistance (fighting against attempts to uncover these unconscious feelings) are common psychological tactics for warding off painful affects associated with the unearthing of this unconscious realm. Free association is the "fundamental rule" in psychoanalysis—attempting to say whatever comes to mind—by which the patient hopes to slip past resistances to get at these hidden thoughts, feelings, and memories.

The psychoanalytic model of the mind also encompasses the foundational idea of transference, which means the ways in which our relationships (in analysis and elsewhere) are structured by certain long-standing patterns of relating, sometimes causing distress and often dating back to early childhood. As Freud first recognized, and contemporary psychoanalysts have since developed, our minds are constituted in and through our identifications with and internalization of important others, in other words, our ways of bringing other people into our inner world. And conversely, our powers of fantasy bring organization, meaning, and richness to the external world. For psychoanalysts, our minds are rife with complexities and paradoxes. We are vulnerable to our own blindness and self-destructiveness at the same time that we are capable of great self-insight and transformation; our unconscious feelings and attachments keep us mired in the past at the same time that they enrich our present relationships and experiences; we are driven by unconscious forces at the same time that we exercise some important measure of agency. This rich and complex picture of the psyche cuts across the major ideological divides to constitute what this book loosely refers to as contemporary psychoanalytic thought.

Critics of psychoanalysis deride the field for being unscientific, or worse, pseudoscientific.[8] These critics view psychology as a branch of the natural sciences, one that should be judged by the quality of its experimental methods, the refutability of its theories, and the strength of its qualitative findings. But the criticism is too often blind to the humanistic value of the psychoanalytic enterprise. Psychoanalytic treatment and methods do not comport with established scientific methods, and few psychoanalytic ideas are testable by traditional scientific means. Psychoanalytic principles instead derive from the analyst's observations of the patient, of herself, and of what transpires between them in the clinical treatment context. The fact that psychoanalytic findings derive from this observational matrix surely does not render them unhelpful or untrue. Rather, a century of psychoanalytic clinical work has yielded fundamental insights into mental life that are substantiated every day inside and outside the clinical consulting room. Psychoanalytic methods of study are an invaluable source of reliable and well-documented findings about the existence and operation of beliefs,

intentions, and motivations at an unconscious level.[9] For example, psychoanalysis gives us a solid understanding of psychological phenomena such as "transference," the process by which an individual unconsciously experiences other people through the lens of old patterns of relating, and "projective identification," a process by which an individual unconsciously induces certain unwanted emotions and desires in another person. At this point, scientific methods are not sufficiently attuned to grasp the subtlety, complexity, and intersubjective nature of such experiences. By identifying and explaining these dynamic processes, psychoanalysis offers, in the words of the Nobel Prize–winning neuroscientist Eric Kandel, "the most coherent and intellectually satisfying view of the mind."[10] It is certainly the best developed and most comprehensive theory of mind that currently exists.

Critics of psychoanalysis also often mistakenly conflate the nature of truth-seeking in a specific analytic treatment with the different goal of truth-seeking about the mind's functioning generally, and they use "truth" as defined in the former context to discredit the concept developed in the latter context. We cannot be certain in any particular case, for example, whether a specific memory from childhood is true as a historical matter. But absolute historical accuracy, while obviously relevant, often is not of great moment in the clinical setting. The focus instead is on what psychoanalysts call "psychic truth," that is, the meaning of these memories in the mind of the patient. This conception of psychic truth is not at all the same as the "truth" sought by psychoanalysts when they endeavor to identify or define the functions of mind, that is, the mental processes that generally structure and inform thinking, feeling, fantasizing, dreaming, and remembering. These basic mental processes—including resistance, transference, repression, sublimation, and the vast arena of unconscious guilt, defenses, conflicts, and attachments that comprise subjective experience—*do* have a claim to truth status based on a century of clinical validation.

The point runs deeper. For our purposes here—for law—the whole critique of psychoanalysis as "not science" is a red herring. The fact that psychoanalytic methods and interpretive techniques come closer to the humanities than to the hard sciences tells us nothing useful about the relevance of psychoanalysis for the law. Our common law system has profitably

drawn on the humanities, particularly history and philosophy, to deepen and complicate law's understanding of human behavior and thought. Law and psychoanalysis share a humanistic perspective regarding the idiosyncratic, individual, and diverse nature of subjective experience. Both disciplines utilize the individual case method along with more abstract ways of describing and organizing human behavior. Psychoanalysis begins at the level of the particular—what is unique about the individual—and then distills this particularized information into general rules of thinking and behavior. Law tends to operate in reverse, beginning with laws of general applicability and then drilling down into the idiosyncratic and contingent aspects of a person's subjectivity in the context of a particular case. As we will see, psychoanalysis can help law on both fronts: in formulating abstract rules that better reflect the reality of psychological experience and in identifying when law should take into account the granular characteristics of the individual.

This book thus draws on contemporary psychoanalysis in an effort to revitalize legal interest in what the humanities have to say about our deepest selves. Psychoanalysis and law are natural allies. Psychoanalysis's normative framework is perfectly suited to a liberal legal system fundamentally committed to the ideals of personal autonomy and individual liberty. While Freud drew our attention to the realm of the irrational, his psychoanalytic psychology embodied a fundamentally secular Enlightenment project aimed at bringing reason to bear on the operation of unconscious superstitions, fantasies, and desires.[11] Although attuned to romantic insights into mental life—especially the deeply irrational dimensions of human nature—psychoanalysis deploys reason and methodical, detail-oriented inquiry in an effort to liberate the individual from the tyranny of unconscious forces. As the philosopher and psychoanalyst Jonathan Lear tells us, psychoanalysis is the only psychological field devoted, in theory and practice, to fostering human freedom.[12] No other school within psychology attempts to provide meaningful insight into what it means to be an agent with the capacity to choose freely. To the contrary, most psychological fields focus narrowly on other ends, such as adaptation to circumstances, symptom reduction, or happiness. Psychoanalysis alone synchronizes its own goal to

that of the patient; in other words, it aims to maximize the patient's experience of personal agency and choice. It cultivates habits of self-reflection that facilitate greater ego strength and agency. Most of the psychoanalytic thinkers we will encounter—Melanie Klein, D. W. Winnicott, Hans Loewald, Stephen Mitchell, Nancy Chodorow, to name only a few—offer a vision of psychic life that is deeply relational but also in tune with the ideals of personal autonomy and individual liberty that lie at the heart of our liberal legal system.

The fundamental alliance between psychoanalysis and law, rooted in their shared humanistic methods and shared ideal of human flourishing, provides a platform for exploring in greater detail the relevance of psychoanalysis to law. This book undertakes to identify and examine those areas where the gap between law's presumption of rationality and lived reality is most acute. As we will see, modern psychoanalysis is most relevant to laws touching upon the two classic psychoanalytic themes of love and aggression, in other words, the law relating to intimate relationships and wrongdoing. Although family law and criminal law are the paradigm fields, the relevance of psychoanalytic thinking radiates outward to many other areas of law with rules bearing, directly or indirectly, on intimate relationships and wrongdoing, including evidence law, contract law, and tort law. The tapestry of issues covered gives a concrete and textured overview of the kinds of legal problems best suited for initiating psychoanalytic study. The book looks closely at contracts between intimates, criminal confessions, therapist liability, custody of children, adult consensual incest, the insanity defense, verbal threats, and children's rights. The history presented in chapter 2 reveals that many legal issues not directly relating to intimacy or aggression are amenable to psychoanalytic inquiry as well, such as freedom of expression and judicial decision-making. Even a realm of law as seemingly straightforward as business law undeniably deals with unconscious desires and aggressions. Although almost every area of law opens up under a psychoanalytic gaze, the core focus of our psychoanalytic study in this book settles on the paradigm areas of family relationships and criminal behavior, broadly defined.

Why intimacy and wrongdoing? Psychoanalysis shows us that love and aggression are two of the most powerful motivating forces in human

behavior, often operating at an unconscious level and with roots going back to early childhood. Intimacy and wrongdoing are situations in which psychoanalysis tells us individuals are not only most vulnerable to powerful unconscious feelings but also most likely to encounter internal resistance to self-knowledge. We begin, then, with the legal study of intimacy and wrongdoing because these are the regulatory areas most likely to involve behavior touching upon the strong unconscious dynamics that so easily subvert conscious decision-making processes and stubbornly resist attempts at self-examination. Family law and criminal law deal most directly with unconscious loving and aggressive feelings acted out in close relationships with others. Family law tackles relationships imbued with feelings of attachment, dependency, rage, and guilt. The criminal law confronts behavior that is often irrational, frequently motivated by powerful unconscious aggressions largely immune to rational self-control and understanding.

To be clear, applying a psychoanalytic perspective to the law does not mean discarding law's presumption of rationality altogether, even for intimate relations and criminal wrongdoing. As we have seen, psychoanalysis homes in on love and aggression as the trouble spots in human experience, the arenas where rational thinking and autonomous choice are most likely to run off the rails. But a psychoanalytic inquiry is not unbounded. Law rightly respects the individual's decision to marry, for example, despite the obvious presence of unconscious factors, for reasons beyond the psychology of the matter: fostering cultural norms surrounding marriage, or protecting the personal privacy of individuals, or quieting fears about governmental paternalism. In the realm of criminal law, we presume intent to pull the trigger because in holding people accountable for their behavior, we further the goal of social order. A psychoanalytic approach to law's regulatory function does not prevent setting limits on a psychoanalytic inquiry by weighing factors and values external to psychoanalysis. The in-depth analysis of particular legal issues in this book best illustrates how this balancing of factors, intrinsic and extrinsic to psychoanalysis, can and should further law's practical and normative aims.

While relatively small in number, psychoanalytically inclined legal scholars have produced much good work over the past decades. Cultural

legal feminists have drawn on the psychoanalytic writings of Nancy Chodorow and Carol Gilligan.[13] Antidiscrimination theory owes much to Charles Lawrence's seminal article, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism."[14] Legal scholars doing work at the intersection of law and humanities look to psychoanalytic theory in exploring questions about legal sovereignty, criminal punishment and responsibility, the regulation of sex, maternity and paternity, and interpretation.[15] Peter Brooks has given us psychoanalytic insights into the role of the unconscious in criminal confessions.[16] The unconscious dimensions of desire that underlie our criminal justice system have been explored by Martha Grace Dunkin.[17] Elyn Saks has opened our eyes to psychoanalytic thinking about consent to medical care, among other subjects.[18] Clare Huntington looks at American family law through the lens of the psychoanalyst Melanie Klein's work.[19] Peter Goodrich, Maria Aristodemou, David Caudill, and similar theorists explore the relevance of Lacanian ideas to legal theory.[20] Work on testimony, memory, and witnessing from a psychoanalytic perspective has been done by Cathy Caruth, Shoshana Felman, and others.[21] This book builds on much of this existing work in making the case for psychoanalysis becoming a major interdisciplinary paradigm in American law.

Work in psychoanalysis and law, of course, does not stand alone. Legal scholarship today has opened its doors to research coming from scientific psychology. It would not be overstating things to say that the legal world has undergone a "behavioral revolution" over the last few decades, ushering in a new era in which legal scholars and judges increasingly apply insights from cognitive psychology and neuroscience to the law. The behavioral law and economics movement has emerged at the turn of the twenty-first century as one of the most powerful intellectual forces in the legal academy. Psychoanalysis does not appear anywhere on the radar of these scientifically oriented behavioral legal thinkers.

The time has come to reassess the legal academy's single-minded focus on the teachings of scientific psychology by bringing psychoanalytic legal scholars into conversation with their behavioral counterparts. As the conclusion to this book lays out, clarifying the relationship of psychoanalysis to the current behavioral movement in law reveals surprising synergies

between the two fields. But it also illuminates what is distinctive and vital about psychoanalysis's contribution to the law. Missing from the behavioral account are psychoanalytic insights into the relational, conflicted, self-deceptive, self-destructive, and self-reflective dimensions of mental life. Certainly scientific psychology—notably cognitive psychology—has much to offer legal thinkers working out the doctrines and principles of law. We will see in the conclusion how the effort of behavioral scholars usefully supplements, and often verifies, psychoanalytic ideas. But psychoanalysis presents a richer, more holistic, and more humanistic perspective on the mind's workings than does scientific psychology standing alone.

The Katz, Goldstein, and Dershowitz project that opened this introduction succumbed to misunderstandings about psychoanalysis in law and in the broader culture. But the project also ultimately faltered on the authors' own doubts about building a new interdisciplinary paradigm for law. As we will see, their doubts were tragically misplaced. The legal fiction of rationality reinforces a view of the legal system as an objectively ordered, even scientific, undertaking rather than a human enterprise grappling with irrationality both inside and outside the courtroom. The law is a deeply humanistic discipline, one that can and should tailor its operating doctrines and foundational ideals—free will, individual liberty, and personal autonomy—to the lived reality of human psychic life. By drawing on psychoanalysis's rich account of the mind, with all its complexity and paradoxes, we have the opportunity to reform legal doctrine and theory in ways that engage and acknowledge the reality of subjective experience, thereby fostering a more humane, psychologically informed, and fundamentally fair system of justice.

PART ONE

Foundations

ONE

Why Psychoanalysis Matters to Law

This book aims to establish contemporary psychoanalysis as an important interdisciplinary resource for law in the twenty-first century. At the broadest level, the field of psychoanalysis complicates the law's presumption of free will and the notion of a conscious, rational self that underlie most legal doctrine and theory. Psychoanalysis also questions the law's methods of interpreting subjective states of mind such as motive, intent, and voluntariness. In particular, two overarching inquiries structure and inform this book's study of psychoanalysis and law: the question of who we are as human beings, and the question of what we can know and prove about subjective states of mind.

Undertaking these inquiries from a psychoanalytic perspective makes a vital contribution to law in three ways, as this chapter will explain. To begin with, psychoanalysis improves the law's theoretical foundations by modifying the law's presumption of rationality—the presumption that legal actors are knowing, consciously choosing individuals—as well as the fundamental ideals of free will and personal autonomy that shape and inform our liberal legal system as a whole. Second, psychoanalysis improves legal doctrine by identifying those particular subject matter areas where the law's presumption of rationality leads to rules and decisions that violate fundamental principles of fairness and justice, primarily in the areas of family law and criminal law. As we will see, psychoanalysis offers a body of practical knowledge that can help legislators and judges to humanize the law by bringing legal rules into line with actual, everyday lived experience. And finally, psychoanalysis furthers the law's adjudicatory function by revealing the deep tension between the law's subjective standards of liability and its objective methods of proof. Psychoanalytic insights shed light on the vexing relationship

between historical and narrative truth in the courtroom, and ultimately move law in the direction of a more skeptical, less epistemologically certain, and more forgiving model of judging. These three psychoanalytic contributions—to legal theory, doctrine, and adjudication—are described in this chapter and then explored in concrete ways throughout the remainder of this book.

Legal Theory

With some important exceptions, the law relies on a presumption of rationality, that is, a presumption that adult individuals are conscious, knowing beings who generally make decisions consistent with their beliefs, desires, and intentions. Of course no one actually believes that individuals are rational automatons; we know people behave irrationally at times. That is in part why our legal system is so busy. But nevertheless, the law acts *as if* people are rational; it deploys a presumption of rationality in designing its laws and adjudicating its disputes. The presumption of rationality treats individuals as transparent to themselves, in other words, as aware (or at least capable of being aware) of their own motivations and intentions. The presumption assumes self-control as well as self-transparency in the sense that people not only know what they intend, but act in accordance with their intentions. These rationalist assumptions fit comfortably within a normative legal framework that posits a straight and unbroken line connecting intentions to conduct and conduct to consequences.

The law relies on this well-entrenched fiction that people make conscious choices and consciously intend their actions in order to justify holding them responsible for their behavior. For example, criminal law presumes that people mean to pull the trigger when they do so, unless they were forcibly coerced or insane; it treats confessions as reliable and voluntary utterances unless clearly compelled; it presumes knowledge of wrongdoing for all but the criminally insane. This presumption of rationality operates in areas well beyond the criminal law: we hold people to a standard of care in tort law based upon how a reasonable person would behave; we enforce contracts according to the objective meaning of the words even when a

party did not consciously intend that meaning; we posit knowledge of the law on the part of lay people even when obviously lacking.

We need not look far to discover the conflict between the law's presumption of rationality and the psychoanalytic understanding of mental life. In sharp contrast to law, psychoanalysis sets out to dispel the idea that we are in conscious, knowing control of our lives. Psychoanalysis focuses on irrational behavior: actions that contradict conscious preferences or beliefs, or actions that are patently self-destructive or incomprehensible. From a psychoanalytic perspective, conscious thought is an important part of mental functioning, but it is not the only—or even the primary—engine driving human behavior. That individuals are motivated by unconscious feelings and desires, that conflict is inherent in the human psyche, that early experience affects adult choices, and that repression and resistance are fundamental ways of responding to unpleasant realities are unavoidable truths about human experience. We may want and hope to live in a world governed by free will, rational choice, and transparent self-knowledge, at least most of the time, but we in fact spend our lives knowing and experiencing ourselves as moved by motives and wishes outside our conscious awareness or control.

Psychoanalysis thus challenges law's presumption of rationality by documenting the ways in which individual decision-making is not always, or even reliably, the product of conscious, informed choice, but instead the result of unseen motivations, beliefs, and desires that often elude us.[1] Specifically, psychoanalysis recognizes a "dynamic" dimension to unconscious life, that is, a stratum of unconscious experience that exists outside our conscious awareness and that often conflicts with our conscious beliefs and desires. In the notion of the dynamic unconscious we find the hidden processes of repression and resistance, and the unsettling states of conflict and ambivalence that disturb our sense of ourselves as stable, integrated, rational, conscious beings. Fantasies, thoughts, and beliefs do not simply reside in our unconscious minds; they contradict each other and come into conflict with conscious thoughts and wishes. And the dynamic unconscious resists being brought to awareness; we fight mightily to keep unconscious elements hidden away. Merely turning one's attention inward stands no chance against the forces of unconscious resistance.

By highlighting the dynamic unconscious, psychoanalysis brings to light a troubling gap between the law's presumption of rationality and the lived reality of mental life. If human behavior is not always the product of deliberate, conscious choice, as the law generally assumes, but rather is continually influenced by unconscious beliefs, emotions, and motivations, then many legal rules and doctrines stray far from reality. The implications of the law's false portrait of human nature are multiple and profound. Law fails to explain or account for some of the most salient aspects of human experience, in particular when individuals behave in ways that contradict their conscious preferences or beliefs, or that are patently self-destructive or incomprehensible. Because the law ignores the unconscious processes at work in human behavior, it cannot provide satisfactory answers to the most basic and recurrent legal puzzles: Why would an individual enter into a prenuptial agreement against his or her own interest? Why do people repress memories of traumatic events? Why would an abused partner choose to stay with her abuser? Why do individuals fail to change when confronted with evidence of their own discriminatory attitudes? Psychoanalysis likewise helps to reveal antiquated, unreliable, and simplistic notions about human intentions embedded in the law, such as the assumptions that individuals on the verge of death speak the truth, that people who threaten violence will carry it out, that those who run from the scene of a crime are guilty, and many other claims based on the fiction of human rationality.

We need not look far to see how the presumption of rationality undermines the law's commitment to individual fairness and justice. As discussed in later chapters, the presumption of rationality leads, for example, to criminal responsibility in cases where individuals have been coerced into confessing through deceptive police tactics; to the failure to prosecute for sexual assault where consent was lacking; to liability for express threats of violence when the speaker intended to communicate something else altogether. The presumption of rationality acts as a legal assault upon the genuinely unknowing or naive: fit parents can lose custody of their children; patients can be involuntarily committed without cause; innocents can be prosecuted when they lack awareness of their own wrongdoing. These legal dilemmas and more will be covered in this book. When we look closely, we see that

concerns about the gap between law's presumption of rationality and lived experience will vary according to the circumstances. For example, the presumption of rationality works well when applied to arms-length commercial agreements, but not very well when applied to close family contracts or criminal interrogations. Law's claims to individual fairness and moral legitimacy rest on its capacity to fit its legal prohibitions and injunctions to the reality of people's subjective lives in the particular circumstances.

Why does the law insist on the presumption of rationality in the face of incontrovertible evidence of deeper forces at work? Law resorts to a fiction of rationality in large part because doing so seems essential to furthering the goals of a liberal legal system committed to the ideal of individual liberty. The law is a practical discipline requiring practical tools, and the presumption of rationality is one of them. We posit free will, autonomous choice, and transparent self-knowledge because we believe that to do otherwise would absolve individuals of personal responsibility, sanction antisocial or destructive behavior, and justify intolerable paternalistic governmental interventions. We fear collapse of the system if the law were to dig beneath the surface of human conduct. The presumption of rationality, accurate or not, is considered necessary to further the liberal legal system's need to find personal accountability as a means for securing social order in a liberal state.

The law thus resists psychoanalysis because the idea of the dynamic unconscious seems to be irredeemably at odds with the law's liberal norms and the social order that law functions to uphold. But this resistance is itself rooted in the mistaken idea that psychoanalysis views the individual as helplessly *irrational*. Nothing could be further from the truth. The portrayal of psychoanalysis as a wholly deterministic theory of mind—each of us is a puppet on the strings of our irrational unconscious—severely misapprehends the ideas at work. While psychoanalysis insists that most behavior has causal antecedents that are not fully understood or controlled by the actor, it by no means contends that all behavior is irrational or beyond a person's capacity to control. To the contrary, psychoanalysis takes very seriously the individual's capacity for agency and choice in the face of unconscious forces: it posits a dynamic unconscious at the same time that it recognizes a conscious, reasoning, observing part of the self; it laments the near impossibility

of free association at the same time that it designs its entire treatment structure around that mode of expression; it remains pessimistic about self-insight at the same time that it proposes autonomy as the goal of psychoanalytic treatment. These psychoanalytic paradoxes—with their calibrated balancing of conscious and unconscious, insight and resistance, autonomy and abjection—give us a rich portrait of human agency under conditions of psychological constraint.

Let us pause to consider the philosophical roots of this psychoanalytic portrait of the mind. Some view the romantic conception of a hidden interior "chaos" as the philosophical tradition behind psychoanalysis.[2] Certainly the classic psychoanalytic self is romantically charged, constantly disrupted by libidinal (sexual) and aggressive desires arising from the unconscious. To take just one example, in *The Psychopathology of Everyday Life*, Freud described slips of the tongue, forgetting, and other trivial missteps as signaling the unruly conflicts and resistances operating just below the mind's rational surface.[3] Modern psychoanalysts build on Freud's turbulent portrait of the self. Feminists such as Julia Kristeva emphasize subjectivity as a process rather than a static state, characterized by "contradictions, meaninglessness, disruption, silences and absences."[4] Jonathan Lear recounts Freud's treatment of the "Rat Man," who, in describing his fantasies, would "bury his head in his hands, cover his face with his arm, jump up suddenly and rush away, his features distorted with pain."[5] In his leaping and cringing, Lear suggests, the Rat Man dramatically displayed the kind of ordinary disruptions of self that we experience—consciously and unconsciously—every day. While some psychoanalysts emphasize cohesion and continuity as central aspects of a healthy self-identity,[6] most psychoanalysts recognize the fractious, undisciplined nature of unconscious life and its disruptive effects on conscious experience.

But while psychoanalysis depicts this romantic undertow to our conscious lives, it also draws from Enlightenment values in its adherence to the basic principle that, through the exercise of reason, an individual can obtain some measure of control over these disruptive, unconscious aspects of the psyche. Many psychoanalytic thinkers make reference to "the strong liberal-Enlightenment dimension that Freud retained in his theory," including "the promotion of rational understanding and the strengthened ego."[7] Our

decision-making may be infused with unconscious desire, fantasy, and guilt, but the exercise of relative autonomy—a capacity for independent, reasoned choice in the face of these hidden facets of the mind—comports with both common sense and basic psychoanalytic tenets. Freud relied on reasoned choice, limited as it was, as the method and goal of his therapeutic treatment: "Where id was, there ego shall be."[8] Thus, despite the discipline's emphasis on the unconscious, psychoanalysis is committed to the idea that it is through the exercise of conscious reason and self-reflection that an individual can master the mind's darker, more disruptive elements. Psychoanalysis teaches us that we are capable of making choices with relative freedom but always subject to the constraints of unconscious thoughts, feelings, and desires. These unconscious thoughts, feelings, and desires elude easy self-examination—indeed, they may even trigger elaborate self-deceptive maneuvers to avoid detection—and so we are always acting with only partial understanding of ourselves.

With these insights into the dynamic unconscious, psychoanalysis shows us that the process of self-reflection—of coming to know one's own mind, to the extent possible—must be part of law's understanding of the human actor as well. While at times recognizing welcome departures from reality-based thinking—in creative and romantic states, for example—psychoanalysis values the role that reasoned self-reflection plays in developing and maintaining a coherent sense of self over time. Trauma and madness are the dark side of the mind's inability to narrate a coherent and stable identity and place in the world. Yet a psychoanalytic perspective on agency does not equate with the classic rational choice model. Psychoanalytically, the ego is never in full control; the unconscious is always intruding upon conscious life; fantasy always colors our reality-based thinking. Nevertheless, while psychoanalysis destabilizes the idea of a unified self, it promotes the freedom and autonomy gained from fortifying self-reflective capacities and the development of a *relatively* stable sense of self over time.

These psychoanalytic insights directly relate to law's mission. For it is our capacity for self-reflection—our ability to know and control what goes on in our minds—that justifies the law's holding us responsible for our behavior. At the same time, psychoanalysis shows us the moments when this capacity for self-reflection is most likely to be compromised. The task for law, and

undertaken in this book, is to identify those circumstances where the capacity for self-knowledge may be seriously impaired, and then to evaluate the possible legal responses. At the end of the day, personal accountability may still be the necessary response, but, as we will see in the chapters to come, it is an accountability subject to careful consideration and refinement.

Thus we should consider the apparent tension between law and psychoanalysis as an invitation to deeper interdisciplinary inquiry rather than as an irresolvable conflict between two unrelated fields. Each discipline contributes to the shared aim of putting into place a practical conception of human freedom that recognizes both agency and constraints on agency. This joint venture between law and psychoanalysis can be undertaken while still acknowledging that there must be limits to the psychoanalytic critique of legal rationality. As the scope of psychoanalytic inquiry broadens, so too does the worry that law must, as a pragmatic matter, treat individuals as conscious agents of their decisions and behavior. This is a serious concern. To put the point another way, the real problem is not that psychoanalysis is irrelevant to the law, but rather that it is *too* relevant. An unrestrained psychoanalytic assault on the presumption of rationality risks bringing law to its knees.

This book does not advocate such an unthinking application of psychoanalysis to law. We need not make the stark choice between an unforgiving presumption of rationality and an equally uncompromising psychoanalytic critique. The question for any workable system of law is when to presume conscious choice and when to pull aside the veil of rationality. At times the presumption of rationality will be necessary, and at times the presumption will undermine the system's basic ideals of justice and fairness. The question for law, and explored in this book, is where precisely to draw the line.

Legal Doctrine

We take up, then, the concrete task of reforming legal rules and doctrines to bring them closer into line with what we know about mental life. Here we see the practical contribution psychoanalysis can make to modifying the presumption of rationality that underlies so many of the laws discussed in this book. When law's operative concepts stray too far from lived experi-

ence, legal doctrine can and must recalibrate. Closing the gap between law and mind does not mean that we psychoanalyze the parties in every case. We need not examine why a particular spouse signed a particular prenuptial agreement on a particular occasion to conclude that agreements in long-term marriages generally should be reviewed for fairness; we need not probe extensively into why a particular man stayed with his abusive partner to decide that the law should relax its standards of self-defense when he kills him; we need not explore in depth why a particular defendant ran from the scene of a crime to justify a jury instruction on consciousness of guilt. Freud himself concluded that psychoanalysis is not the right instrument for determining the actual subjective state of the parties in particular legal disputes.[9] He knew, as do we, that the parties cannot be put on the couch. Instead, psychoanalysis helps us to refine legal rules and doctrines in ways that take account of the complex workings of our inner lives.

The legal rules governing intimacy and violence—specifically, family law and criminal law—are the starting point for a psychoanalytic study of law, in large part because love and aggression are the prime source of the troubles encountered in everyday life. Contemporary psychoanalysis sheds important light on law's efforts to regulate the behavioral effects of the strong, often-unconscious emotional forces of love and aggression. Freud centered his work on love and aggression because he believed that these two emotions were innate human drives fueling our unconscious desires and conflicts. With a slightly different take on the matter, many contemporary psychoanalysts consider love—or attachment—as the intrinsic force that drives us to connect emotionally to others, beginning with our earliest caregivers, and aggression as a response to failures in that caretaking. Yet however they view the origins of these emotions, almost all psychoanalysts follow Freud in treating love and aggression as central defining facets of psychic life.

The inner world of love and aggression is dynamic and complex. Loving and hating feelings toward other people can coexist in various ways at various times. While one person might feel ambivalence about an important person in her life, experiencing some balanced measure of affectionate and negative feelings at the same time, another might, under stress, split her

feelings, veering back and forth between an all-loving and an all-hating state of mind. Love might conflict with conscious moral commitments, as when love brings betrayal of a spouse or friend, or it might simply come into direct conflict with feelings of hatred toward the same person. Aggressive feelings toward a loved one might also prompt excessive feelings of guilt, such that aggression is turned upon the self, leading to self-destructive acts of wrongdoing, sometimes with the goal of being punished. A person might rationalize his own aggression toward a loved one by exaggerating the bad behavior of that person, or by masking the aggression behind exaggerated feelings of love. Early experiences of love and aggression can color an individual's lifelong pattern of relating, leading her to repeated acts of self-destructive wrongdoing without knowing why. Overwhelming dependency needs for another person rooted in early childhood might be mobilized by adult relationships. A person's unconscious traces of early childhood experiences, internal representations of caregivers, and unconscious memories might mysteriously narrate his adult life with timeless persistence. Narcissism might keep feelings for others at bay.

Psychoanalysis reminds us that this complex world of love and aggression has important relational dimensions. Even narcissism—which looks like the absence of strong feelings for others—can operate as a defense against an unconscious need for, or rage toward, other people. Freud's theory of the Oedipus complex was a relational story about the internalization of feelings coming from parental figures. Modern object relations theorists deepen the relational dimensions of psychoanalytic practice and theory by exploring the earlier, pre-Oedipal relationship between infant and caregiver. All psychoanalysts recognize the "transference," that is, the unconscious loving and hating derivatives of early relationships as they get expressed in the context of present-day relationships to others. For many, the focus of treatment is on working out the patient's lifelong patterns of relating as they emerge in the relationship between analyst and patient. The analyst's own feelings about the patient—the countertransference, as it is called—are now understood to facilitate rather than impede the work.

A psychoanalytic perspective on the complex dynamics of love and aggression allows us to begin to assess the consequences of law's fiction of

rationality. The law of intimate violence provides a stark illustration. Although many puzzling questions surround intimate violence, including why an abuser would feel entitled to physically assault her partner, one persistent question is why so many victims delay in leaving their abusers. Commentators offer differing explanations for an abused partner's seemingly irrational decision to postpone separation, or relatedly her decision not to press charges, or to return home. Some argue that victims suffer from "battered women's syndrome," a mental disorder that impairs rational decision-making powers by instilling a sense of helplessness and passivity. Others argue just the opposite, that the abused partner does not leave because she rationally calculates the physical, economic, and social risks to her and her children if she were to do so. Yet we cannot fully understand an individual's decision to stay with an abuser without a clearer picture of the way in which any of us might keep love and hope alive, even in the face of physical brutality. Psychoanalysis teaches us that an abused partner may not be either mentally ill or fully rational, but rather caught in a complex emotional web of love and hate, sometimes going back to early childhood. A psychoanalytic view of an abused partner's decision to stay avoids rationalist thinking—she is either ill or rational—and normalizes her decision to stay, a decision that includes, perhaps, hope for reconciliation if not redemption, a return to an earlier psychic state of safety and love. We should want to know more about these psychological dynamics when determining whether the abuse took place, how serious it was, whether an abused partner who kills her abuser should be prosecuted, and what her sentence should be.

Modern psychoanalysis presents a dramatic portrait of the individual as an emotionally desiring, conflicted, unknowing, and sometimes self-destructive creature battling the forces of love and hate. These battles find their way into the legal system, primarily—although not exclusively—in the areas of family law and criminal law. The remaining chapters in this book mostly relate, in one way or another, to the core substantive areas of intimacy and wrongdoing. Among the issues we will study are criminal confessions, surrogacy agreements, threats of violence, adult incest, and children's rights. Certainly psychoanalysis has something to say in other areas as well, but the primary spheres of interest here are the legal regulations governing

love and aggression. As the chapters to come illustrate, psychoanalysis can help further law's highest ideals by bringing legal doctrine in these areas into line with the full complexity of our unconscious lives.

Legal Adjudication

Psychoanalysis is not only a body of knowledge about the mind; it is also a practical treatment focused on understanding the complex, often-hidden facets of an individual's subjective life. As a clinical practice, psychoanalysis offers important insights into law's own practical mission of rendering judgments about human behavior.

Consider first the foundational tension between rules of liability and rules of proof. Subjective standards of liability are ubiquitous in the law. Psychoanalysis brings to the surface a deep and fundamental tension within our legal system: on the one hand, law typically puts subjective intent at the center of its rules of liability; on the other hand, law's standards of proof avoid, evade, and eschew questions of subjective intent at almost every turn. Criminal law is paradigmatic in this respect because most crimes require that the defendant must have acted with a "guilty mind." We call this the *mens rea* requirement: not only must a defendant have taken some action, the *actus reus*, but she must have done so with the requisite mental state. Law insists on a *mens rea* requirement because our criminal justice system still largely rests on the idea that legal liability should reflect moral responsibility. In most cases, imposing criminal liability on a defendant who did not intend to cause harm, did not know what she was doing, or had no control over herself or her conduct violates deeply rooted norms of individual fairness and moral accountability.

A defendant is punished not simply because she committed a particular act but because she meant to do the act or intended the consequences. A defendant may also be punished for behavior she did not intend, but strict liability and negligence crimes are well understood to occupy an uncomfortable, outlier status in a field traditionally defined by its insistence on "bad" intentions.[12] The Supreme Court has reiterated the point on many occasions, including the 2015 case *Elonis v. United States*: "Although there

are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'"[11] The recent rise in strict liability and negligence crimes may indeed indicate the law's implicit acknowledgment that traditional categories of "intention" will often need supplementation. A legal regime that calls such supplemental liability "criminal" necessarily confronts a conceptual crisis for the notion of legal responsibility. These categories of liability—strict liability and negligence—are exceptions to the general rule that criminal liability requires moral culpability.

Many civil rules and doctrines also turn on subjective mental state. All laws incorporating elements of intent, knowledge, voluntariness, or consent require the adjudication of a person's mental state, as do laws requiring proof of character, propensity for violence, remorse, emotional attachment, and competency. Tort law frames a category of serious wrongful acts defined by the wrongdoer's intention, such as assault or intentional infliction of emotional distress. Child welfare laws generally lead to termination of parental rights only where parents have failed to make good-faith efforts to care for their children. The Supreme Court interprets the Equal Protection Clause as requiring a showing of intentional discrimination. As with criminal law, these subjective standards ensure that only those who are morally blameworthy will be subject to the law's punitive actions. We generally insist on a culpable mental state as a basis for legal liability, criminal or civil, because we believe that principles of individual fairness and moral desert normally (although not always) require that individuals be held accountable only for harms that were the product of conscious choice. We do not condemn those who did not know, or had no reason to know, the wrongfulness of their actions, or who could not control those actions.

How does law know and prove what goes on in the mind of legal actors? Despite law's unwavering commitment to the idea that a culpable mental state is a prerequisite for liability, proof in the courtroom frequently relies on objective factors. Proving subjectivity is both essential and elusive, and must be determined by indirect means. What "lurks within" can never be known directly; inferences and indicia are all we have. Sometimes this conundrum leads to a dilution of the legal standard itself: the doctrine of criminal negligence, for

example, requires the government to prove only that a reasonable person in the defendant's position would have foreseen that her conduct would bring about the harm, even if it cannot be shown that *this* defendant actually foresaw the harm. It is much easier to establish what a "reasonable" person would have known in the circumstances than to prove what this particular defendant actually did know at a certain place on a certain day. Objective standards in the courtroom take other forms as well. Based on accepted evidentiary rules, juries are allowed to use certain presumptions about a person's mental state. For example, a judge may tell jurors that they are free to evaluate the truth of a witness's statement by applying the presumption *falsus in uno, falsus in omnibus*, which allows a single moral transgression—one bad act—to be treated as a sign of an individual's entire character. Similarly, hearsay law presumes that certain statements are true, such as "dying declarations," "statements against interest," and "spontaneous utterances," regardless of the declarant's actual state of mind. For now, it is enough to acknowledge the dilemma: we expect trials to uncover the truth about a person's motives and intentions, but law cannot satisfy its own demands in this respect, and must resort to highly imperfect methods of proof in the courtroom.

Contract law provides a perfect example of the law's two-sided nature. On the one hand, contract law confirms law's obsessive concern with subjectivity. Contracts are not formed until there has been a proverbial "meeting of the minds," a phrase now out of favor but still evocative of the principles of contract formation. And the subjective intent of the parties is the touchstone of contract interpretation. Yet the evidentiary laws governing breach of contract cases explicitly utilize objective standards of proof. We infer intention and meaning from the four corners of the document itself, even if one or both parties did not actually intend any such construction. The parol evidence rule, although technically not an evidence doctrine at all, is a rule of contract law that generally excludes evidence of actual intention from being considered by the decision-maker. Thus, while contract law posits intent as its conceptual benchmark, the adjudication of that intention is governed by rules that often redirect inquiry away from the contracting parties' actual state of mind.

Psychoanalysis only worsens the law's evidentiary dilemma by raising questions about *unconscious* intent. Psychoanalysis reminds us that words

and actions do not necessarily mean what they seem and that common sense can lead one far astray. In Freud's terms, manifest meaning can disguise the latent content of an individual's statements or conduct. Sometimes the meaning of words is transparent, but often it is not. Even the most straightforward statement—"I am going to kill him"—might signify something other than a true threat, such as exasperation, irony, or even fierce attachment. Conduct too can be less than transparent in meaning. Running from the scene of a crime might signal guilt, but it might also communicate fear or even remorse relating to some other event, real or imagined. Law presumes that "dying declarations" are reliable on the theory that nothing could possibly motivate a person to lie on her deathbed. But psychoanalysis suggests that such declarations might just as easily reflect the declarant's continued resistance to confronting errors too painful to acknowledge, or a "noble" desire to protect others, or the denial of death even in life's final moments. In all these cases, psychoanalytic insights complicate and unsettle the process of proving mental state in the courtroom.

Of course, psychoanalytic insights into the dynamic unconscious might be marshaled in support of law's turn to objective standards. Holmes concluded that common law liability should be based on the foreseeable consequences of behavior rather than subjective motivation precisely because he understood that human motivations are often the product of thoughts and feelings buried at an unconscious level.[12] Better to impose an objective standard of liability—what a reasonable person would have known or intended in the circumstances—than attempt to prove through testimony or other evidence what the defendant was really thinking and feeling when he committed the crime or uttered the statement or signed the contract. This flight into objectivity may be a perfectly sensible response to the difficulty, perhaps impossibility, of proving an individual's subjective state of mind. If pulling back the curtain on the mind is too difficult, then the proper response might well be: Close the curtain!

Indeed, Freud himself took the position that psychoanalysis has little to add to law's work in the courtroom. In an address to aspiring lawyers, Freud drew "an analogy between the criminal and the hysteric."[13] Each has a "secret," and each discipline—psychoanalysis and law—has devised its own

ways of getting at it. Freud rejected the idea that law would borrow psychoanalysis's "detective device" in order to prove unconscious meaning in the courtroom. Truly guilty individuals, he argued, will resist psychoanalytic inquiry. More to the point, the innocent may be inclined to confess out of a desire for punishment. Freud admonished his audience: "In your examination you may be led astray by a neurotic who, although he is innocent, reacts as if he were guilty, because a lurking sense of guilt that already exists in him seizes upon the accusation made in the particular instance."[14] And certainly Freud was right in this regard: psychoanalysis does not provide diagnostic methods for ascertaining a party's guilt or innocence on the witness stand. In commenting upon Freud's address, James Strachey concluded that Freud wrote "to deprecate any half-baked application of psycho-analytic theories in legal proceedings."[15] Freud, like Holmes before him, believed that law must wall off the idea of the unconscious from its adjudicatory procedures.

The problem, of course, is that law wants to have it both ways. Law uses subjective standards of liability to legitimate its exercise of force and execution of judgments, but then resorts to objective measures of proof that undermine those subjective standards by assuming transparency, coherence, and consistency of meaning and selfhood. The potential contribution of psychoanalysis here is vital. It is not that psychoanalysis resolves the contradiction; to the contrary, psychoanalysis deepens our understanding of the gap between law's subjective standards of moral culpability and what we actually can know and prove about true intention in the courtroom. Psychoanalysis's real contribution lies in *acknowledging* this epistemological chasm. It is one thing to adopt objective legal standards based on a frank acknowledgment of the opacity of human motivation, but it is quite another to adopt an objective legal standard on the theory that people's motives and intentions are actually known. The law tends strongly toward the latter approach, and it does so because the claim legitimates the legal sanction.

By illuminating the difficulty of knowing and proving state of mind, psychoanalysis necessarily injects a more skeptical note into law's mission of judging. Adjudication cannot establish with certainty that a legal actor actually intended to do the wrongful act, or that words or conduct really meant what they seemed. Given law's adjudicatory limitations, a less morally

certain attitude toward judging emerges, what we might call "good-enough judging." Psychoanalysis insists on the importance of humility in the face of limitations on our self-knowledge and our knowledge about other people. Objective standards of proof, such as the reasonable person, must be seen for what they are: fictional accounts of an actor's state of mind.

The point is not merely philosophical but has concrete implications for law. For example, criminal confessions are considered the "queen of proofs" in the courtroom.[16] When a defendant confesses, a conviction normally follows. We treat confessions as true largely because we presume that no rational person would confess to a crime she did not commit. Yet as we will see in chapter 4, false confessions are a common occurrence. While people may falsely confess for all sorts of reasons, psychoanalysis makes a unique contribution in highlighting how an individual can be driven to confess by feelings of unconscious guilt unrelated to the crime at hand. A psychoanalytic recognition of the possible gap between confessional words and historical events opens the door to a more honest appraisal of the reliability of confessions and a greater skepticism toward the legal system's capacity to get at the "truth" of what really happened. This insight should lead to confessions being examined with greater scrutiny, held to a higher standard of proof, or, in some cases, excluded from evidence altogether. Psychoanalytic skepticism does not mean that all defendants go free, but it does lead us to judge with a greater awareness of the limitations on knowing, with certainty, the truth of a confessional utterance.

Psychoanalysis also contributes to law's adjudicatory aims by identifying those times when objective standards of proof do not suffice, most often in the areas of intimacy and wrongdoing. Like it or not, the law must sometimes determine subjective mental state. We need not probe the unconscious with every broken contract. But individual fairness and moral justice require that the law delve into an individual's state of mind at certain times. In the area of child custody, for example, objective standards have proven fruitless. Courts once relied on a tender-years presumption in favor of awarding custody to mothers of young children, then a presumption in favor of the primary caretaker, and then a presumption in favor of replicating the parenting plan of the formerly intact family. One commentator even

suggested, only half facetiously, that the courts should flip a coin, a modern twist on the wisdom of Solomon.[7] But in the end, the best interests of the child require that judges engage in individualized inquiry into the psychological lives and relationships of the family members, often with the help of experts. Psychoanalysis helps draw our attention to those areas where piercing surface presumptions to explore the parties' underlying intent or beliefs is necessary. Many important legal issues demand subjective inquiry: Is this defendant insane? Is this convicted felon well suited to rehabilitative treatment? Does past neglect of a child rule out that parent's future prospects for being a good parent? Does a defendant deserve the death penalty? In all these cases, psychoanalysis can help expose the rationalist assumptions about human behavior that drive the adjudication of actual mental states. It pushes law to modify its rules of evidence—in other words, the rules that govern what meaning or inference should attach to certain kinds of testimony or proof. And in doing so, psychoanalysis compels law to be more honest—and more skeptical—about the ability of the adjudicatory process to arrive at a true assessment of subjective mental state.

Which leads us, finally, to how psychoanalysis invites a reconsideration of judging itself. The standard account of legal adjudication sets "truth" as the mission of the fact-finding process: whether a defendant actually pulled the trigger, or ran the red light, or abused the child. Establishing what we can call "historical truth" means proving what really happened in the world and what really went on in an individual's mind at some point in the past. Legal judgment is justified by reference to historical truth: if courts are going to deprive an individual of liberty or property, then this judgment should be based on reality. This conventional, commonsense account of the relationship between judgment and facts recognizes that legal rules may appeal to moral commitments, but their enforcement through judgment rests on establishing the truth. We struggle to know what really happened because law's legitimacy depends upon getting "what happened" right.

In contrast, we assume that psychoanalysis does not put the discovery of historical truth at the center of its inquiry. Rather, the psychoanalytic enterprise focuses on constructing a narrative that makes sense of psychic truth: the way in which events in the world are subjectively perceived,

experienced, and remembered. Although Freud often presented himself as an archeological explorer of the mind, discovering the buried historical past of incestuous desires and murderous wishes, he touches upon a different psychoanalytic process in his "Constructions in Analysis" paper. The analyst's task, Freud writes, "is to make out what has been forgotten from the traces which it has left behind or, more correctly, to *construct* it."[18] For the most part, Freud believed that what was being "constructed" was historical truth. But there is a moment in his paper when Freud goes further. He writes, "Quite often we do not succeed in bringing the patient to recollect what has been repressed. Instead of that, if the analysis is carried out correctly, we produce in him an assured conviction of the truth of the construction which achieves the same therapeutic result as a recaptured memory."[19] Contemporary theorists pick up on this point. Roy Schafer describes the "inescapably intersubjective, hermeneutic, and narrative features" of the psychoanalytic situation.[20] Peter Brooks describes the psychoanalytic process in similar terms: "Narrative truth, then, seems to be a matter of conviction, derived from the plausibility and well-formedness of the narrative discourse, and also from what we might call its force, its power to create further patterns of connectedness, its power to persuade us that things must have happened this way, since here lies the only explanatory narrative, the only one that will make sense of things."[21] In psychoanalysis, we fill in the gaps between known facts, we elaborate on what we know to form a coherent story, we construct an integrated sense of self in time and space.

Have we finally arrived at a point where we can say definitively that law and psychoanalysis part ways? The law remains faithful to the empirically driven process of establishing historical truth, whereas psychoanalysis dedicates itself to the hermeneutic process of constructing a coherent narrative that better reflects the truth of internal experience. But even here, it turns out that law and psychoanalysis are more allies than opponents. In psychoanalysis, the notion of narrative truth can be taken to mean simply that what matters for psychoanalysis is the subjective experience of an event, not the event itself. Yet psychic truth always bears a relation to historical truth, and a significant divergence between the two is a serious cause for concern. Psychoanalysis focuses on the subjective experience of an event, but it does not

disregard history. It obviously matters whether a traumatized patient was actually abused as a child, or whether a paranoid patient is actually being stalked by a former lover, or whether a depressed patient was actually fired from his job. Even Freud's "abandonment" of the seduction theory did not deny the importance of reality: indeed, for Freud, the Oedipus complex mattered precisely because it is fantasy and not the memory of actual childhood assault.

The law confounds our assumptions in a similar way. Although the law's adjudicatory mission is to uncover historical truth, it is clear that we are not always getting at "truth" in any strictly empirical sense. Legal narratives told in the courtroom are based largely, but rarely fully, on concrete, historical facts. Objective standards of proof and evidentiary rules serve to shape a narrative of intent—a story, so to speak—that may have little to do with what really happened.[22] In any case where state of mind is at issue, law necessarily stakes its claim to truth on the construction of convincing narratives. We may have certain facts, the testimony of witnesses, some concrete evidence, but even the most scrupulously fair legal process can never establish with certainty what went on in the minds of legal actors. In words attributed to Justice Louis Brandeis, "To be effective in this world you have to decide which side is probably right; and, once you decide, you must act as if it were one hundred per cent right."[23] Justice Robert Jackson similarly described the Supreme Court's place as the highest court in the land: "[W]e are not final because we are infallible, we are infallible because we are final."[24] This veering away from the truth serves many functions for law. Objective standards and evidentiary rules operationalize the values of certainty, finality, and predictability of legal proceedings.

Once again we have arrived at a point of intersection. Psychoanalysis and law each combine modes of historical analysis with modes of narrative construction. Yet can we rest comfortably with the idea of law as narrative in a way akin to psychoanalysis? A final inescapable difference threatens to divide the two fields. Law must judge. And once judgment comes into play, contingency, ambivalence, and doubt are quickly banished from the scene. Narrative alternatives are destroyed.[25] In our adversarial system, one side wins and the other side loses. Ambiguity is not operative and nurtured—it is

stamped out. Does the narrative-destroying process of judgment definitively separate law from psychoanalysis? We presume that psychoanalysts do not sit in judgment on their patients. But legal rules and punishment do exist in psychoanalysis, of course. Rules of conduct are laid down: no sex, no violence, sessions must be attended, payment must be made. If these rules are violated, some even once, then the treatment will end.

Psychoanalysis takes a judgmental position in a more fundamental way as well. Analysts aim not to pass moral judgment on their patients, but they nevertheless do judge what it means to live a meaningful life. Psychoanalysis engages in value judgments by gauging a patient's capacity to carry out the psychoanalytic work: to be self-reflective, attuned to the unconscious, psychically flexible rather than constricted. And psychoanalytic judging can even partake in the violence of law's judgment, particularly in cases where liberty is at stake based on an analyst's opinion regarding dangerousness. In these ways, psychoanalytic judging comes to resemble legal judgment. Yet ultimately, in contrast to our present legal system, psychoanalytic judging in the consulting room aspires to be empathic, interpersonal, and rehabilitative, even transformative.[26] At its finest, psychoanalysis points us toward a vision of good-enough judging, that is, judging that provides a coherent, plausible narrative of the parties' behavior and intentions while acknowledging its lack of absolute certainty. And so, with great surprise, we see that law can learn from psychoanalysis about judging, too.

TWO

The Psychoanalytic Tradition in American Law

On December 9, 1995, the Harvard Law School professor, psychiatrist, and psychoanalyst Alan Stone delivered a keynote address to the American Academy of Psychoanalysis, entitled "Where Will Psychoanalysis Survive?" Stone was a familiar figure in psychoanalytic and legal circles. He had begun his career as a psychiatrist at McLean Hospital. In 1965, he joined Alan Dershowitz in teaching a seminar on law and psychoanalysis at Harvard Law School. Dershowitz eventually concluded that psychoanalysis had little to offer the law, making good on the mysterious "if any" haunting the beginning of his treatise with Katz and Goldstein. Stone, however, eventually joined the faculty of Harvard Law School and continued to teach the course on his own. In 1984, he published a book, *Law, Psychiatry, and Morality*, in which he explored the moral implications of psychoanalysis for the criminal law.[1]

In his 1995 keynote address, however, Stone switched course. He now asserted that psychoanalysis belonged to the arts and the humanities rather than to practical disciplines such as psychology, psychiatry, and, presumably, law. As he predicted, psychoanalysis "will survive in popular culture where it has become a kind of psychological common sense and in every other domain where human beings construct narratives to understand and reflect on the moral adventure of life."[2] Stone was right to associate psychoanalysis with more humanistic modes of observing and thinking, but he was wrong to imply that this kind of knowledge and understanding is at odds with the serious work of practical disciplines such as law. In law's domain, narratives are constructed and judged on a daily basis. The psychoanalytic tradition in American law remains a critically important resource for grounding these narratives – and the rules and principles that shape them –

in the reality of people's everyday experience of themselves and the world. Understanding this tradition is the first step in reconstituting it to fit developments in both law and psychoanalysis over the past century.

This chapter surveys the tradition of law and psychoanalysis in the United States from its heady early days following Freud's 1909 visit to America up to the mid-twentieth century, when the tide began to turn. While "tradition" may seem too strong a term for the diverse collection of psychoanalytic writings carried out by legal thinkers during this period, what ties this work together is a shared recognition of the unconscious depths of the human psyche and the common questions that a psychoanalytic perspective on human behavior raises for law. Despite the dominating presence of the rationality paradigm, law has never fully embraced the ideal of the rational actor. A significant body of legal scholarship and judicial decisions premised on a deeper and more complex view of human nature has held an important and uninterrupted place in legal thought over the past century.[3] As this chapter details, many early- to mid-twentieth-century legal thinkers and judges turned to psychoanalytic ideas for help in addressing a broad set of concerns, including the value of free speech in a democracy, the processes of judicial decision-making, degrees of criminal responsibility, and child custody.

Psychoanalytic thinking in law emerged in the context of the early-twentieth-century legal reformers' attack on what they saw as the abstraction and formalism of traditional legal thought. The "legal realists," as they are called, rejected traditional legal thinking, advocating instead for the development of legal rules based on real-world empirical and pragmatic considerations.[4] In his 1886 lecture "The Profession of the Law," Oliver Wendell Holmes Jr. extolled the virtues of the social sciences for guiding legal reform. "If your subject is law," he sweepingly proclaimed, "the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life."[5] Similarly, the legal scholar Roscoe Pound espoused a sociological jurisprudence that affirmed the superiority of empirical science over formal logic as a basis for legal reasoning.[6] In 1908, the lawyer and later Supreme Court Justice Louis Brandeis introduced social science data into the courtroom, winning over a majority

of the Supreme Court in *Muller v. Oregon* with a one-hundred-page brief filled with social science statistics about the deleterious effects of long work hours on women.[7] By 1920, the legal realist program for the interdisciplinary study of law set in motion by Holmes, Pound, and Brandeis had come to define the dominant trend in legal thought.

It is well known that the legal realists included psychology among the most valuable and useful of the social sciences for legal study.[8] Less well known is the role that psychoanalysis played in the early decades of the twentieth century. This chapter focuses on those early- to mid-century legal thinkers whose attention was captured by the unconventional, sometimes even shocking, psychoanalytic ideas about the unconscious, guilt, free will, conflict, instinctual drives, sexuality, and early childhood experience. The members of this group include several key characters—scholars, judges, lawyers, and psychoanalysts—who will appear and sometimes reappear throughout this historical narrative: Oliver Wendell Holmes Jr., Clarence Darrow, Theodore Schroeder, the brothers Sheldon and Bernard Glueck, David Bazelon, Herbert Wechsler, Jerome Frank, Harold Lasswell, Felix Frankfurter, Robert Hutchins, and Joseph Goldstein.

Looming behind all these prominent legal and psychoanalytic dignitaries was the figure of Freud himself. Freud came to the United States only once, in 1909, to deliver his famous lectures on psychoanalysis at Clark University. He lectured in German to a mostly professional audience, but many of his ideas, including the unconscious, censorship, fantasy, instinctual drives, childhood sexuality, and repression, were soon circulating in the popular press as well as among social scientists, radical thinkers, and progressive reformers.[9] Freud's "earliest impact came as a contribution to the changing *Zeitgeist* of the first decades of the twentieth century."[10] WWI and the widespread war trauma—known as "shell shock"—accelerated the introduction of Freudian ideas into American culture.[11] By the 1920s, psychoanalytic ideas had swept through the social sciences,[12] including history,[13] sociology,[14] and political theory.[15] Although at this time Freud's work was not widely available in English, Americans had access to psychoanalytic ideas indirectly through the popular press[16] and secondary sources,[17] such as Edwin Holt's widely read book *The Freudian Wish*[18] and Walter Lippmann's

A Preface to Politics.[19] The public also encountered psychoanalytic ideas in drama and literature.[20] By 1920, Freud had become a household name.[21]

Lawyers and legal scholars were among those drawn to this new psychology.[22] Described by one legal historian as the most widely read piece of early-twentieth-century legal realist literature, Jerome Frank's 1930 book *Law and the Modern Mind* offered a psychoanalytic manifesto on judicial decision-making.[23] One might be misled into thinking that Frank's book was legal realism's first foray into psychoanalysis. Yet the book, which historians tell us burst upon the legal academy like "an intellectual atomic bomb,"[24] did not in fact appear out of thin air. The historical prominence of Frank's book has obscured the less dramatic ways in which psychoanalytic ideas penetrated legal thinking in the two decades preceding the book's publication. Indeed, Frank's book should be viewed as the *culmination* of years of debate among legal reformers, judges, and scholars about human irrationality and its implications for a broad range of legal issues. As we will see, Frank's work settled into a legal culture that had already begun grappling with the implications of psychoanalysis for American law.

Oliver Wendell Holmes Jr.

The roots of the psychoanalytic tradition in law are to be found in Justice Holmes's nineteenth-century jurisprudential work. This may seem a surprising genealogical discovery, given that Holmes is best known for having anticipated the behaviorist psychologists of the early twentieth century who eschewed inquiry into subjective states of mind in favor of a focus on the external trappings of behavior.[25] Holmes's behaviorist views on human nature were most famously captured in the concept of the "reasonable man," first developed by Holmes in his 1881 book *The Common Law*.[26] Yet Holmes's behaviorist approach was in fact informed by a psychological portrait of human nature strikingly similar to the one drawn only a few years later by Freud. Holmes's early jurisprudential writings paved the way for the introduction of Freud's new psychology into law by emphasizing such concepts as instinctual drives, unconscious passions, and inner conflict. Like the romantic writers he read most frequently—notably, Wordsworth, Coleridge,

Carlyle, and Goethe—Holmes asserted the centrality of irrational thought and feelings in human experience.[27] To the extent that Holmes promoted a vision of human nature remarkably consistent with Freud's portrait of the fantasizing, conflicted, inward-directed self, Holmes's writings laid the thematic groundwork for the introduction of psychoanalysis into law only a few decades later.

The psychological concept most salient in Holmes's early legal writings was the notion of the unconscious. From the first pages of *The Common Law*, Holmes developed a model of legal decision-making founded on the idea of unconscious factors and dedicated to the process of identifying those factors no longer serving socially useful ends.[28] The notion of the unconscious as encompassing emotions or ideas influencing behavior, but not subject to direct knowledge or observation, was present in the work of many philosophers and writers known to Holmes, including his own father.[29] In 1907, Holmes would argue that a decision-maker's reasoning reflects "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . which may lie beneath consciousness without losing their worth."[30] Holmes's view of the unconscious was not necessarily benign. As he told a group of Boston lawyers in 1900, "We are all very near despair. The sheathing that floats us over its waves is compounded of hope, faith in the unexplainable worth and sure issue of effort, and the deep, subconscious content which comes from the exercise of our powers."[31]

Yet Holmes's idea of the unconscious as encompassing ideas and feelings not readily accessible to awareness was not the entire picture, for he viewed the unconscious in dynamic terms as well. Instinctual drives such as revenge, possession, sexual satisfaction, and self-preservation color the pages of Holmes's early jurisprudential works and resonate with his idea of unconscious forces directing individual behavior in ways that conflict with conscious beliefs or desires. Holmes's writing is full of passages depicting man at his most emotionally elemental: thrusting the stranger off the plank into the deep sea; filled with the rage of revenge; stubbornly holding on to acquired possessions; and ravishing virtuous women.[32] He presented this aspect of the unconscious by means of a cave metaphor: he likened unconscious motivations to a dragon that, once dragged from his dark cave

into the light of consciousness, can be killed or tamed, but while hidden in the cave remains a savage, fantastical force in human nature.[33]

Holmes's psychological views informed his study of the law. While he believed that legal study should be carried out by "the man of statistics and the master of economics," he also made clear that "an understanding of economics" was not the only way "to get to the bottom of the subject" of law.[34] Holmes highlighted economics as an important branch of the growing social sciences, but he never slighted the importance of psychology: "Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man."[35] Holmes argued that unconscious instinctual drives must be taken into account in designing a practical and effective system of legal rules. In psychoanalytic terms, he believed that law must operate as a sublimation of man's most elemental and unconscious passions.

Holmes devoted the entire first chapter of *The Common Law* to the proposition that all liability is rooted in the human instinct for revenge, and the theme remains dominant throughout the rest of the book.[36] "My aim and purpose," he explained toward the end of his discussion, "have been to show that the various forms of liability known to modern law spring from the common ground of revenge."[37] As he explained, the individual's instinct for revenge originally manifested itself in violent self-help, but eventually evolved into a system of legal rules aimed at punishing blameworthy actors. This human need for vengeance produced an early legal system that focused on "the actual internal state of the individual's mind."[38] As the common law evolved, however, subjective standards were eventually replaced by objective rules aimed at controlling socially harmful behavior rather than punishing bad motivations. "[W]hile the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into

external or objective ones, from which the actual guilt of the party concerned is wholly eliminated."[39] Legal standards had evolved over time, but what had not changed was the underlying human desire for revenge.

We may be prone to overlook the idea of the unconscious in Holmes's writings because his behaviorist approach to legal liability has occupied center stage. He insisted on a reasonableness standard under which "[t]he law considers . . . what would be blameworthy in the average man, the man of ordinary intelligence and prudence."[40] Yet Holmes's insistence on an external standard of liability—a standard "wholly indifferent to the internal phenomena of conscience"—did not necessarily make Holmes a strict behaviorist, as that term would come to be defined.[41] Any inconsistency between his introspective psychology and his objective legal standard disappears once we understand that Holmes believed that an appreciation of the role of the unconscious in shaping human behavior was essential to fashioning optimal legal rules, even while the rules themselves apply only to external behavior.[42] His conclusion that common law liability should turn upon the consequences of objective behavior rather than subjective motivation appealed to him precisely because he understood that human behavior is often the product of irrational thoughts and feelings. Given that subjective motivations cannot be known directly, legal liability must limit itself to knowable behavior. The most compelling justification for Holmes's external standard of liability rests on his appreciation for the internal realm of unconscious motivations and desires.

Holmes was not alone in his behaviorist prescriptions. Contrary to expectations, Freud arrived at exactly the same conclusion. Freud argued that psychoanalysis was not suitable in the courtroom and that judging should be limited to an examination of external behavior. In his 1906 lecture, "Psycho-Analysis and the Establishment of the Facts in Legal Proceedings," Freud explained that the psychoanalytic process is "far removed from the practical administration of justice" precisely because the task of ascertaining the criminal defendant's true state of mind is so difficult.[43] Criminals hide what they know, and even innocent individuals may react as if they are guilty. Both Holmes and Freud inferred from the existence of unconscious life that legal proof should be limited to evidence of human behavior and not concern itself with the realm of subjective states of mind.

While it may seem overly speculative to forge a connection between America's most important legal thinker and Sigmund Freud, one close friend of Holmes's did just that. In a letter to Holmes written in 1929, Sir Frederick Pollock aptly observed that "[t]he sound foundation of Freud's (if his followers don't wrong him) crazy sky-scraper seems to have been discovered by you long ago."[44] Pollock was right to note that Holmes's work foreshadowed, in rough outline at least, fundamental aspects of Freud's psychology. Of course, there is no evidence that Holmes was directly influenced by Freud or even read his work at this early stage in his career. Most of Holmes's jurisprudential writings date from before the publication of Freud's first psychoanalytic work, *Studies on Hysteria*, in 1895,[45] and the first reference to Freud in Holmes's correspondence does not come until 1914.[46]

When he finally did read Freud, Holmes expressed amused skepticism regarding the "remoteness" of Freud's dream interpretations from the dreams themselves. After reading *The Interpretation of Dreams* in 1914, Holmes remarked in a letter to Einstein:

> I am engaged with Freud on *The Interpretation of Dreams* of which I have heard talk. I think it must suffer very severely even in the substance of the argument from translation, but it is interesting. Ladies should be warned not to tell very innocent sounding dreams in public. An umbrella, unlike its behavior in day life, generally is an instrument capable of begetting offspring. And going upstairs—well—there you are. The remoteness of the pictures from what Freud says they mean is amazing. He is a doctor, I think of great experience, and I don't doubt knows what he is talking about, but his statements and arguments in the translation, it seems to me, have to be taken a good deal on faith.[47]

Clearly, Holmes belonged more to the generation of nineteenth-century romantic thinkers than to the generation of Freudian psychologists who came of age in the early twentieth century.[48] Yet it was exactly this cluster of romantic ideas about the unconscious, instinctual desires, inner conflict, irrationality, and imagination that provided the shared philosophical background for Freud's new psychology and Holmes's major jurisprudential work.

In his biography of Holmes, Mark DeWolfe Howe tells us that Harold Laski asked an elderly Holmes to describe how he had come upon the idea for his major 1881 work, *The Common Law*. Holmes replied in a revealing passage, "You ask me what started my book. Of course I can't answer for unconscious elements. . . . I think the movement came from within—from the passionate demand that what sounded so arbitrary in Blackstone, for instance, should give some reasonable meaning. . . ."[49] Ideas about the unconscious, inner passions, and heroism were central themes in Holmes's life as well as his work. It comes as some surprise that America's most influential legal thinker, long viewed by the legal academy as advocating views in line with John Watson and the later behaviorists, was in fact an early and enthusiastic proponent of psychological ideas associated most closely with psychoanalysis.

Holmes's legacy is thus divided. With his emphasis on the reasonable man and objective standards, Holmes indisputably set the stage for the introduction of behaviorist psychology into law. But with his views on unconscious life, Holmes also opened law's door to ideas coming from the new "science" of psychoanalysis. In particular, his attention to the unconscious influences on judicial decision-making resurfaced, as we will see, in the work of three later judicial luminaries: Benjamin Cardozo, Jerome Frank, and Felix Frankfurter. Although he is best known as a doctrinal behaviorist, Holmes should nevertheless also be considered a seminal figure in the psychoanalytic strain of legal realism that emerged in full force after World War I.

Freedom of Speech

The First Amendment's protection for freedom of speech was a fierce battleground during the early twentieth century, and psychoanalysis was at the center of the conflict. Prior to WWI, constitutional protection for speech was largely limited to restrictions on the government's ability to impose prior restraints. Individuals had a right to express themselves, but the government nevertheless had the power to punish individuals for speech that had a "natural tendency" to bring about socially undesirable ends.[50] For example, the federal and state Comstock laws (outlawing speech deemed obscene) and the federal Espionage Act of 1917 (making "subversive advocacy" a crime)

were justified on the ground that the speech these statutes regulated was morally and politically dangerous. Critics of these laws developed legal arguments that drew on ideas associated with the new psychoanalytic psychology. Radical advocates for free speech focused their attacks on the antiobscenity laws, while progressive legal reformers set their sights on dismantling laws that restricted political speech. In making their legal arguments, both groups utilized ideas about the unconscious, sexuality, and repression being forged in a culture increasingly enamored of psychoanalysis.

Sexual Speech. A central figure in the movement for greater speech rights in the early twentieth century was Theodore Schroeder.[51] At first blush, Schroeder may seem an odd figure upon whom to bestow a leading role in the history of free speech law. Schroeder was a free speech absolutist, an intemperate advocate, sometimes inaccurate in his scholarship and not especially well connected to the leading intellectuals of his time. Despite the fact that he published more work on free speech than any other scholar of his generation, he is virtually unknown today by anyone other than legal historians. For decades, his work did not appear in any of the standard accounts of the development of free speech doctrine or theory. Yet by some accounts, Schroeder was one of the most important free speech advocates and writers of his day.[52] As head of the Free Speech League, Schroeder was at the forefront of the campaign against the Comstock laws. His book *"Obscene" Literature and Constitutional Law* was broadly read and admired at the time.[53] Although he remains well in the shadow of such leading figures as Zachariah Chafee, Holmes, and Learned Hand, legal historians now recognize Schroeder as a seminal figure in the early free speech movement.

In Schroeder's work, we discover the psychoanalytic views that informed debates over free speech at this time. Schroeder's interest in psychoanalysis grew after he underwent a personal analysis in 1914; he later went on to become a prolific psychoanalytic writer and lay analyst himself. He aligned himself with a radical libertarian philosophy emphasizing the importance of sexual speech to self-expression and individual autonomy. Schroeder was known to visit on occasion the New York City salon of Mabel Dodge, where anarchists, syndicalists, feminists, and free love advocates enthusiastically debated Freud's ideas. "In some ways Mabel Dodge's 'salon' became the symbol

of the confluence of these trends and of championship of Freud's teachings."[54] Not surprisingly, libertarians of the era turned to Freud's ideas about the harm of sexual repression to buttress arguments in favor of loosening restrictions on speech deemed obscene.[55] Psychoanalysis "bore most of the burden of the common popular association between the new psychology and sex."[56] For libertarian advocates of free speech like Schroeder, Freud's ideas about the sexual drive and the dangers of repression provided a critical perspective from which to attack the hypocrisy of early-twentieth-century mores and laws relating to sexuality, marriage, and gender.

Schroeder and the libertarians were not alone in their interest in sex talk. Freud's influence on the intellectual climate of the era can also be detected in the more mainstream progressive arguments for free speech in the WWI years. "[O]nce the Progressives discovered Freud, prostitution, free love, and birth control, external and internal restraints against public discussion of sex were broken."[57] The early-twentieth-century American social hygiene movement urged greater openness on matters such as prostitution, male promiscuity, and venereal disease.[58] Both the American Society for Sanitary and Moral Prophylaxis and the American Social Hygiene Association were founded during this time with the goal of eradicating venereal disease and improving social morals through sex education.[59] In 1912, the National Education Association advocated the teaching of "sex hygiene" in all schools.[60] Although causal connections cannot be definitively established, the social hygiene movement was one avenue for the popularization of Freud's ideas about sexuality.[61] The president of Clark University and child psychologist J. Stanley Hall, who invited Freud to come give his 1909 lectures at the university, advocated for sex education on the ground that dangerous sexual feelings could be sublimated into safer, more constructive channels.[62] In contrast to radical free speech advocates, social hygiene proponents drew on Freudian ideas in order to strengthen, rather than undermine, traditional social morals.

That both radical libertarians and more mainstream progressive reformers advocated for greater free speech rights in matters of sex tracks a tension within psychoanalysis itself. On the one hand, Freud's ideas about sexuality and repression posed a clear threat to the established social order.[63] Freud

dared to challenge conventional morality by talking about sex: to his patients, to his professional colleagues, and to the general lay public. Yet despite the unsettling effect that theories of Oedipal desires, autoeroticism, and childhood sexuality would have had on early-twentieth-century American sensibilities, Freud's therapeutic goals were largely conservative. While Freud believed that sexual repression was causing hysteria in his female patients, his therapy encouraged them to resolve their neurotic conflict by accepting the prevailing social views about women. In 1914, the American psychologist James Jackson Putnam referenced psychoanalytic ideas when describing his progressive political ideology. "It may well be," Putnam wrote, "that psychoanalysis does not take the cultivation of social ideals as an end for which it should directly strive." But, he argued, "psychoanalysts know well the evils that attend the over-assertion of personal desires, cultivated too exclusively in and for themselves, and the importance of the opposite course follows by inference."[64] Freud's ideas about libido and the pleasure principle had much in common with radical views of human flourishing, yet the Freudian therapeutic goal of subordinating sexual pleasure to the reality of conventional morality strongly resonated with the progressive reformers' more conservative emphasis on social control.

Political Speech. Psychoanalytic ideas also played a role in progressive arguments for the protection of unpopular political views. In the years leading up to World War I, few American progressives were opposed to the governmental repression of political speech deemed socially undesirable,[65] in part because of fears that politically inflammatory speech would exploit the citizenry's vulnerability to unconscious suggestion. The idea of unconscious suggestion was already in wide circulation through the work of late-nineteenth-century neurologists. The French neurologist Jean-Martin Charcot was famous for hypnotizing hysterical patients, and then—purportedly by way of unconscious suggestion—removing the offending symptoms. The hypnotic methods employed by Charcot and other nineteenth-century neurologists influenced the work of Freud along with the work of every major American psychologist of the period.[66]

In the years before and during WWI, courts and commentators focused on radical speech as a powerful and dangerous tool for unconscious

suggestion used by charismatic speakers to inflame hysteria in the masses. The theory of unconscious suggestion had been popularized by Gustave Le Bon in his well-known 1895 work on crowd psychology.[67] Le Bon was a French social psychologist who advocated an openly antidemocratic politics based on the idea that groups are particularly susceptible to irrationality caused by unconscious suggestion. Individuals in groups were considered vulnerable to unconscious suggestion because, like hypnotized patients, they underwent a loosening of the ego restraints associated with conscious, rational thought.

Concerns were sharpened by the political atmosphere of the day; many feared that communists, socialists, and anarchists would mobilize the populace through unconscious suggestion. Pacifists such as Randolph Bourne openly expressed concerns about the irrationality of a democratic citizenry seized with war hysteria.[68] Bertrand Russell commented from abroad that "the greatest difficulty was the purely psychological one of resisting mass suggestion, of which the force becomes terrific when the whole nation is in a state of violent collective excitement."[69] In 1915, the legal scholar Roscoe Pound gave direct expression to these fears: "Where men live congested in large cities, especially where there are great numbers subjected to severe economic pressure who are more or less ignorant of the local political institutions and more or less ignorant of the language in which the law is expressed, the danger of mobs, *which are controlled by suggestion*, may require confining of free expression of political opinions on certain subjects to times and places where such things may be discussed without grave danger of violence and disorder."[70] Government censorship of speech was viewed by many as serving the social good in part by suppressing the mechanisms of unconscious suggestion in group life.

The theme of unconscious suggestion undergirds the judicial decisions denying free speech rights during this time. In his famous 1919 opinion for the Court in *Schenck v. United States*, Justice Holmes appealed to the metaphor of the crowded theater in order to justify the governmental restrictions on free speech at issue in the case. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," he reasoned.[71] For Holmes, falsely shouting "fire"

mobilized the group at the level of unconscious suggestion rather than rational thought. The "natural tendency" of speech in group settings—the theater, the battlefield, the overcrowded tenement—was to bring about an unlawful end not through persuasion but by exerting an unconscious influence on the listener to act.[72] Words are mere "triggers of action," as Judge Learned Hand put it in his famous 1917 opinion in *Masses Publishing Co. v. Patten*.[73] The process of unconscious suggestion turned on the charisma of the speaker, which explains why Justice Holmes was less concerned about the speech of "puny anonymities."[74] The Court's solution to the problem of unconscious suggestion in the early years of WWI was thus to allow government to silence the inflammatory speech.

But progressive thinkers famously changed their views on government censorship in the immediate aftermath of WWI.[75] Concerns about radical speech gave way to even stronger worries about the deleterious effects of government propaganda aimed at influencing "the masses."[76] President Wilson's Committee for Public Education produced what one historian describes as "a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all designed to instill a hatred of all things German."[77] Prosecutions carried out under the Espionage and Sedition Acts during WWI only heightened worries.[78] "A large number of writers, both scholars and popularizers, increasingly emphasized the predominance of irrational motivation in the years after World War I."[79] In contrast to his prewar criticism of free speech rights, by 1918 the psychologist John Dewey would refer to this surge in governmental propaganda and censorship as fostering "the rise of the irrational."[80] As Dewey wrote in the November 1918 issue of *The New Republic*, the collective capacity to exercise reasoned political judgments turned on the power of "deliberate thought to direct the play of emotion" to a desirable end, a process which he now believed required free and open discussion.[81]

This antipropaganda fever was the backdrop to the emergence of a psychoanalytically informed defense of free speech. In his 1917 article "Psychology, Democracy and Free Speech," Schroeder expressly drew on psychoanalysis to make the case for the protection of political speech. Schroeder was the first legal thinker to use psychoanalytic ideas in a legal publication,

arguing that government censorship reflects infantile fears of the larger democracy.[52] Schroeder was not alone in drawing a connection between the dangers of governmental exploitation of the citizenry's unconscious suggestibility and Freud's views about repression. In a 1917 paper entitled "The Still Small Voice of the Herd," the prominent historian James Harvey Robinson explored the implications of suggestibility during wartime: "Conscience, the moral sense (as it used to be called), the Freudian 'censor,' may all be explained as the still small voice of the group, expressing itself in vague disapproval or poignant remorse."[53] At a minimum, psychoanalysis strengthened an intellectual climate newly attuned to the dangers of governmental repression. The experience of WWI deepened fears as a darker vision of human beings driven by unconscious aggressions began to emerge in public debate.[54]

Attention to the relationship between psychoanalytic ideas and debates over free speech highlights the fact that free speech law from this era rested on psychological assumptions about unconscious suggestion, sexuality, and repression closely aligned with psychoanalysis. While there is no direct evidence that the emergence of stronger protection for free speech rights was brought about by psychoanalysis, psychoanalytic ideas were part of the intellectual backdrop to debates over free speech rights in this era.[55] In the end, psychoanalytic theories fortified a regime of free speech rights that valued reasoned inquiry and uncensored debate as the best way to manage emerging anxieties over sexual freedom and political dissent in the early twentieth century.

Leopold and Loeb

If Theodore Schroeder was the first legal writer to apply psychoanalysis to law, Clarence Darrow was the first legal advocate to bring psychoanalysis into the courtroom. The year was 1924, and the subject was not free speech, but rather criminal responsibility. Darrow represented Nathan Leopold and Richard Loeb, two adolescent Chicago boys being prosecuted for murder.[56] Freud's theories of child development, sexuality, and psychopathology occupied center stage in the hearing over whether the two boys should be sentenced to death for the murder of fourteen-year-old Bobby Franks.

The facts of the case riveted the nation. At the time of the murder, Leopold was nineteen and Loeb eighteen. They were intellectually precocious adolescents from two of Chicago's most prominent and wealthiest families. Leopold had graduated from the University of Chicago at age eighteen and was planning to attend Harvard Law School. He spoke eleven languages and was a published ornithologist. Loeb was the son of the vice president of Sears, Roebuck, and Co., and the youngest graduate in the history of the University of Michigan. Like Leopold, he too was preparing to attend law school—in his case the University of Chicago. The victim, Bobby Franks, was also from a wealthy Chicago family and lived within walking distance of both boys.[87]

Leopold and Loeb carried out the kidnapping and murder with the aim of committing the "perfect crime." After killing Franks, they sent a ransom note to his parents, but police could not trace it. However, Leopold's glasses were found at the scene of the murder, and eventually the two boys were identified and confessed. Given the social standing of the defendants and the victim, as well as the horrific nature of the crime, worldwide attention focused on the case and, in particular, on the psychiatric testimony of the expert witnesses.[88] The story was an almost constant front-page presence.[89] A public frenzy surrounded the trial, with three thousand people vying daily to win one of the coveted three hundred public seats in the courtroom.[90] A crowd of more than five thousand waited outside the Cook County Criminal Court on the day the sentence was pronounced.[91]

The preeminent legal advocate Clarence Darrow was hired to represent the boys. To everyone's astonishment, Darrow had the boys plead guilty to the crime.[92] By doing so, Darrow avoided a jury trial, thus reducing the boys' chance of receiving the death penalty. Given the passionate public outrage over the crime, Darrow believed that a jury would be more likely than the trial judge to sentence Leopold and Loeb to death. Although he did not present evidence of insanity at the sentencing hearing, Darrow did introduce evidence of the boys' abnormal mental states and their personal family histories as mitigating factors. In doing so, Darrow walked a thin line between conceding the boys' responsibility for the crime at the guilt phase and insisting that the boys were nevertheless not culpable at the sentencing

phase. In response, the state argued that any evidence of the boys' mental condition was irrelevant given that an insanity defense had been waived when the boys pled guilty.

Psychoanalysis was Darrow's main line of defense for the boys, reflecting the prominence of the field by this point in time.[93] Three of Darrow's star expert witnesses were psychoanalysts as well as important figures in American psychiatry generally.[94] William Alanson White was a leader in American psychiatry and an early supporter of psychoanalysis.[95] He served as president of the American Psychiatric Association in 1924–1925, the superintendent of the Government Hospital for the Insane in Washington, DC (now St. Elizabeth's Hospital) from 1903 until his death in 1937, and a professor of psychiatry at Georgetown and George Washington Universities. In 1907, he published what would become the leading textbook on psychiatry, *Outlines of Psychiatry*, which went through fifteen editions over a thirty-year period; he also wrote a 1915 textbook on psychiatry and neurology with the psychoanalyst Smith Ely Jelliffe that had six editions over twenty years. White started *The Psychoanalytic Review* with Jelliffe in 1913, and he later became the president of the American Psychoanalytic Association.[96] His fellow experts in the Leopold and Loeb case were almost as nationally eminent. Bernard Glueck was the well-known director of psychiatry at Sing Sing Correctional Facility in Ossining, New York, and the author of *Studies in Forensic Psychiatry*.[97] William Healy, a major figure in forensic psychiatry, was the director of the psychoanalytically oriented Judge Baker Foundation in Boston and the former director of the Juvenile Psychopathic Institute in Chicago. He had written the important book *The Individual Delinquent*, which, although it did not draw expressly on psychoanalysis, gave powerful support to Freud's (now soundly discredited) views on the sexual origins of mental illness.[98]

After examining the boys over a month-long period, the three psychoanalysts prepared a joint report for the sentencing hearing. While not itself introduced into evidence, the report serves as a general record of the psychoanalysts' in-court testimony.[99] The prosecution experts focused on the boys' states of mind at the time of the crime, but the three psychoanalytic defense experts were concerned with the unconscious roots of the boys'

criminal behavior.[100] The joint report provided a comprehensive overview of the ways in which each boy exhibited abnormal mental characteristics and how these mental abnormalities had their roots in the fantasy years of early childhood.[101] Psychoanalytic ideas structure and pervade the report's conclusions. The experts' general assumption that early childhood experiences and emotional relationships leave a lasting imprint on children, their extensive exploration of the masochistic fantasy life of the boys, their concepts of inferiority and paranoid mania, and their acknowledgment of unconscious motives painted a clear psychoanalytic portrait (as the theory existed at the time) of the causes and contours of the boys' mental characteristics and criminal behavior.

While Judge Caverly allowed Darrow to present the psychiatric testimony at the hearing, he made clear when delivering the sentence that he did not take the testimony into account for purposes of imposing punishment. In his oral decision, he allowed that "the careful analysis made of the life history of the defendants and of their present mental, emotional and ethical condition has been of extreme interest and is a valuable contribution to criminology," but he concluded that these matters "concern the broad question of human responsibility and legal punishment . . . deserving of legislative but not of judicial consideration."[102] Instead Judge Caverly explained that he was basing his decision not to impose the death penalty on the young age of the defendants.[103] While Darrow did not succeed in persuading the judge that psychoanalytic factors should play the determinative role in sentencing, we cannot know the extent to which, despite Judge Caverly's disclaimer, the extensive psychoanalytic testimony in the case influenced his decision.

Psychoanalysis permeated the Leopold and Loeb case in other ways as well. Sensational (and unfounded) rumors circulated in the popular press about the sexual molestation of the victim. Public interest focused on the reported homosexual relationship between Leopold and Loeb, interest that was "subsequently inflamed by psychiatric reports and wide-ranging interviews" with the boys.[104] Additionally, the psychoanalytic testimony in the case raised the troubling question of psychic determinism. Darrow was focused on avoiding the death penalty, but his theory of the case—that the boys were not responsible for their acts because of mental "abnormalities" rooted in

childhood—raised the specter of criminals getting away with murder, literally. The introduction of psychoanalytic testimony in the Leopold and Loeb case heightened the challenges posed by psychoanalysis to legal assumptions about free will and criminal responsibility, challenges that we will see resurface in the context of mid-century debates over the insanity defense.

Psychoanalysis was so much in the public mind during this trial that William Randolph Hearst, the publisher of the *Chicago Herald and Examiner* and the *Chicago Evening American*, invited Freud to visit Chicago to offer commentary on the case. Hearst offered Freud unlimited money and a private steamship to bring him to New York so he would not be bothered by other passengers during the trip.[105] Hearst was not the only publisher eager to have Freud comment on the case. Robert McCormick, the publisher of the *Chicago Daily Tribune*, also invited Freud, offering him twenty-five thousand dollars or "anything he named" to come analyze the boys.[106] Both Hearst and McCormick believed Freud could sell newspapers to a public fascinated with his ideas about children, sexuality, and psychopathology. Being sixty-eight and ill at the time, and harboring a strong antipathy toward America, Freud declined both offers.[107]

The introduction of psychoanalytic ideas in the Leopold and Loeb case coincided with changing ideas about childhood more generally during this period. The notion that children were influenced as much by their environment as by innate constitutional factors played a significant role in bringing about important progressive reforms. Laws relating to school reform, child labor, neglect and dependency, and juvenile courts were among the major pieces of child welfare legislation passed during the first two decades of the twentieth century.[108] Although child welfare advocates from this time would have objected to Freud's views on childhood sexuality, they shared his perspective on the importance of early experience to children's developmental outcomes. As we saw, Stanley Hall, the president of Clark University and perhaps the most prominent child psychologist of his day, had been the one to invite Freud to come give his famous 1909 lectures. The idea that nurture plays an important role in child development was not unique to psychoanalysis, but American psychoanalysts were among its most important early proponents.[109]

The sentencing hearing of Leopold and Loeb thus represents a watershed moment in the tradition of law and psychoanalysis.[110] It introduced psychoanalytic ideas about child development into the courtroom. It raised questions about criminal responsibility that would confound courts and scholars for decades. And it gives us a picture of the extent to which psychoanalytic thinking had penetrated law years before Jerome Frank wrote his famous psychoanalytic treatise on judicial decision-making. It is that to which we now turn.

Judicial Reasoning

Jerome Frank is the most well-known psychoanalytic writer among his generation of legal realists. A judge on the Second Circuit Court of Appeals, Frank published his 1930 book *Law and the Modern Mind* with the aim of developing "that 'realistic' movement in law which seeks to overcome an astonishingly prevalent blindness to legal realities."[111] The book was written during Frank's personal analysis with Bernard Glueck, one of Darrow's expert witnesses in the Leopold and Loeb case.[112] Frank was eager to get the analysis done with quickly and persuaded Glueck to see him twice a day for six months. Taken with the new psychoanalytic psychology, Frank brought psychoanalytic ideas to the attention of the legal world to an extent not previously seen.

Frank's psychoanalytic thesis was relatively straightforward. He began with man's unconscious effort "to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father."[113] As he wrote, people believe in the "basic myth" that legal rules are certain because they unconsciously seek a father substitute in the figure of the judge. Frank argued that this "childish need" for authority leads judges—now invested with this infallible authority—to "rationalize" their decisions rather than confess to the fact that their judgments are guided by nothing more than intuition or hunch.[114] Frank used the term "rationalize" to refer to "[t]his practice of making ourselves appear, to ourselves and others, more rational than we are."[115] In a famous legal realist move, Frank contended that "uniquely individual factors"—those personal attributes of

the judge—determine how the judge will decide any particular case. For Frank, it is these personal factors that shape our intuitions and hunches, and consequently the law. "The peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law."[116] The fact that judges convince themselves that their judgments are reached by way of reason is simply a matter of self-delusion. Roscoe Pound had Frank in mind when he accused legal realists of leading legal thought into a dead end.[117] To critics like Pound, Frank had taken the realist critique of judicial reasoning in the direction of a radical psychological skepticism, an accusation with which Frank might well have agreed.[118]

In his discussion of judicial rationalization, Frank pays homage to earlier thinkers such as Holmes and Joseph Hutcheson. Each of these men, in their own way, had relinquished what the psychoanalytically minded Frank saw as the unconscious need for a father figure in the law. Frank lauded Holmes as "the completely adult jurist" for his work in uncovering how judicial decisions are "most generally . . . the unconscious result of instinctive preferences and inarticulate syllogisms."[119] Frank also applauded Hutcheson, the author of a well-known paper entitled "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," for exploring the role of intuition in judicial decision-making.[120] Frank would have added Cardozo to this list of enlightened legal thinkers, except that Cardozo maintained a "yearning for the absolute" that Frank argued kept him trapped in the childish need for a certain, all-knowing legal authority.[121] Frank celebrated the work of Holmes and Hutcheson in part because he recognized that their ideas about rationalization and the unconscious resonated with the psychoanalytic theories of the day.

Frank was less generous toward Theodore Schroeder, whom we have already met in his role as First Amendment scholar. Twelve years before Frank's *Law and the Modern Mind*, Schroeder espoused a similar theory of judicial rationalization from a psychoanalytic perspective, a fact that Frank only grudgingly acknowledged. In "The Psychologic Study of Judicial Opinions," Theodore Schroeder applied "modern analytic psychology" in order to detect "the hidden impulses determining judicial decisions." Like Frank, Schroeder argued that these hidden impulses concerned "earliest infancy."

In a passage that could have come directly from *Law and the Modern Mind*, Schroeder wrote, "By the deductive application of the general psychoanalytic principles we come to the conclusion that every judicial opinion necessarily is the justification of the personal impulses of the judge . . . and that the character of these impulses is determined by the judge's life-long series of previous experiences, with their resultant integration in emotional tones."[122] Schroeder was also interested in the infantile "lust for power," foreshadowing Frank's theory of the infantile longing for authority.

Despite the strong similarities in outlook, Frank devoted only two paragraphs of his four-hundred-page book to Schroeder, noting that Schroeder had "thought deeply and courageously about the problem [of judicial decision-making]," although his "warm commendation" of Schroeder's "pioneering effort" comes across as lukewarm, at best.[123] Frank rejected Schroeder's argument that the judge's biases will be evident from his written words, that "[e]very opinion thus amounts to a confession."[124] Frank more pessimistically concluded that "[w]e shall not learn how judges think until the judges are able and ready to engage in ventures of self-discovery."[125] To Frank, such "self-discovery" was no easy task: "For the ultimately important influences in the decisions of any judge are the most obscure, and are the least easily discoverable—by anyone but the judge himself. They are tied up with intimate experiences which no biographer, however sedulous, is likely to ferret out, and the emotional significance of which no one but the judge, or a psychologist in the closest contact with him, could comprehend."[126] Because rationalization is an outgrowth of childish thinking, self-reflection is not likely to make law more rational or predictable. For Frank, "[t]he best we can hope for is that the emotions of the judge will become more sensitive, more nicely balanced, more subject to his own scrutiny, more capable of detailed articulation."[127] These were Frank's psychoanalytically informed goals.

Judicial decision-making was on the minds of other psychoanalytically minded thinkers of the period as well. In 1930, the same year as Frank's *Law and the Modern Mind*, the political scientist Harold Lasswell published the provocative paper "Self-Analysis and Judicial Thinking."[128] In contrast to Frank and Schroeder, Lasswell maintained that "intuition" has a positive role in

judicial decision-making. His essay argued that the law's "exclusive emphasis upon the importance of logical thinking incapacitates, rather than equips, the mind of the judge for the performance of its functions."[129] He continued: "[O]ur strictures upon the cult of logic begin by showing that the supposition that emotional aberrations are to be overcome by heroic doses of logical thinking is a delusion. . . . We have been misled by presuming that the mind can rely upon a single mode of operation to find reality."[130] Lasswell thus suggested that the most important contribution that a psychoanalytic view of individual decision-making can make to law is to dispel this "cult of logic"—in other words, rationalization—upon which so many laws and policies rest. In a plea for a theory of legal decision-making integrating both rational cognition and fantasy, he wrote, "It is fair to say that the mind is a much fitter instrument for reality testing when both blades are sharpened, those of logic and of free-phantasy. Until this proposition is understood, the professional training of our judges, administrators, and theorists will continue to furnish disciples in self-deception rather than self-analysis, through a disproportionate emphasis upon a single mode of thought."[131] Mature judgment, Lasswell argued, requires both cognitive faculties and imaginative self-insight. Like Frank, Lasswell advocated personal self-analysis as a means for integrating these dual aspects of mature judgment.

The fact that both Frank and Lasswell arrived at their psychoanalytic critique of judicial decision-making in the same year suggests that psychoanalytic ideas about rationalization were in relatively wide circulation by this time. Almost a decade earlier, in his popular 1921 book *The Mind in the Making*, the historian James Harvey Robinson had drawn on psychoanalysis to argue that "most of our so-called reasoning consists in finding arguments for going on believing as we already do."[132] While Frank and others expressed concerns that judicial reasoning was nothing more than rationalization, their pessimism was not absolute. Frank maintained the hope that legal decision-making could become relatively more objective and predictable, although he did not believe this would happen until judges became more self-aware. Having undergone an analysis himself, Frank held open the idea that personal insight was possible.

We hear later echoes of Frank in the work of an unlikely ally: Justice Felix Frankfurter. Like his fellow jurists Holmes, Cardozo, and Frank before him, Frankfurter struggled with the implications of the unconscious for judicial decision-making. In his 1952 decision in *Public Utilities Commission of the District of Columbia v. Pollak*, Frankfurter argued that judges strive to decide cases based on conscious, dispassionate reasoning. But he went on to observe: "[I]t is also true that reason cannot control the subconscious influences of feelings of which it is aware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves."[133] By this point, even Frankfurter had come to accept the central tenet of the unconscious and its influence on judicial decision-making. Frankfurter was more restrained than Frank in his assessment of the role of unconscious factors in decision-making. Nevertheless, all four of the towering twentieth-century judges we have encountered—Holmes, Cardozo, Frank, and Frankfurter—were in their own ways grappling with the same issue: How are we to reconcile the reality of unconscious influences on judicial decision-making with the rule of law? Psychoanalysis posed the question with heightened urgency while offering only minimal reassurance about the possibilities for rational thought. It may have been this issue more than any other that brought legal realism to a crisis point. With WWII looming, few in the academy were in the mood to entertain such a devastating psychoanalytic assault on the American rule of law.

The Insanity Defense

Another critical arena for psychoanalytic thinking in law during the early to mid-twentieth century was the issue of criminal responsibility, and in particular the insanity defense. To everyone's surprise, Clarence Darrow had not raised the insanity defense in the Leopold and Loeb case. He instead had his young clients plead guilty, thus avoiding the risk that the defense would fail and a jury would sentence them to death. Darrow wagered, rightly as it turned out, that a judge would be unlikely to impose the death penalty on the young defendants. But the question of criminal responsibility

remained at the forefront of the case: Should the two adolescent boys be held fully accountable for their heinous act? The psychoanalytic answer, as put forth by the defense experts in the case, was a resounding "no."

The sentence of life in prison for the two boys rather than the death penalty signaled a broader sea change in law's approach to criminal responsibility toward greater leniency, particularly for young offenders. Only one year after the sentencing in the Leopold and Loeb case, the psychoanalyst Theodor Reik predicted that "the psychological insights of psychoanalysis are destined in the near future to transform criminality and criminal jurisprudence in an incisive manner."[134] The core issue was the psychoanalytic view that behavior is often determined by forces outside our conscious awareness. With this arguably deterministic outlook, psychoanalysis directly put into question the presumption of free will underlying the law's notion of criminal responsibility.[135] By mid-century, psychoanalytically inclined psychiatrists, lawyers, and scholars had come to focus their attention on the issue of the insanity defense.

Judge David Bazelon was the most outspoken legal proponent of using psychoanalytic ideas to rethink questions of criminal insanity. The chief judge of the United States Court of Appeals for the D.C. Circuit, Judge Bazelon wrote the decision in *Durham v. United States*, which established—for a short period of time—a psychoanalytically informed legal standard for the insanity defense.[136] By the time Bazelon decided *Durham* in 1954, there was widespread dissatisfaction with the prevailing standard for insanity. Most states applied a test derived from an 1843 English case, known simply as *M'Naghten*.[137] Under the *M'Naghten* test, an accused would not be held responsible for criminal conduct when he suffered "under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong."[138] Many were concerned that the *M'Naghten* test focused solely on the defendant's cognitive capacities. As a result, some states supplemented the *M'Naghten* test with the so-called "irresistible impulse test," under which a defendant would also be judged insane if he was unable to control his conduct at the moment of committing the crime.[139]

Yet even with the addition of this "irresistible impulse" component, psychiatrists of all schools "vociferously criticized the [*M'Naghten*] approach to the

problem of criminal responsibility on the ground that it did not correspond to the state of psychiatric knowledge."[140] They insisted that *M'Naghten* imposed "criteria of responsibility which . . . are based upon antiquated psychological concepts and which are essentially metaphysical rather than psychiatric."[141] Lawyers and judges were no less reticent about the psychological shortcomings of the *M'Naghten* standard. In the year before *Durham*, Justice Frankfurter testified before the British Royal Commission, referring to *M'Naghten*: "I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated."[142] In a 1928 speech to the New York Academy of Medicine, the future Justice Cardozo did not mince words: "Everyone concedes that the present definition of insanity has little relation to truths of mental life."[143] There appeared to be consensus within the psychiatric and legal professions that *M'Naghten* should go.

Judge Bazelon turned these hopes into reality with his decision in *Durham*. The case involved a seriously mentally ill man, Monte Durham, who had been convicted of housebreaking. His only defense was that he was of "unsound mind at the time of the offense."[144] Durham had a long psychiatric history, which included discharge from the United States Navy at age seventeen for unfitness resulting from "a profound personality disorder," an attempted suicide at age nineteen, and multiple commitments to St. Elizabeth's Hospital, where he was diagnosed with "psychosis with psychopathic personality." He was twenty-three when he committed the housebreaking at issue in the case. After his arrest, he was initially found to be of unsound mind, committed to St. Elizabeth's for a fourth time, and given subshock insulin therapy. After six months, he was discharged and brought to trial. Despite evidence that Durham had been suffering from hallucinations and paranoia around the time of the crime, the trial court concluded that he had not satisfied the *M'Naghten* standard of insanity: "I don't think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of his mind."[145] Obviously unhappy with the *M'Naghten* test as it applied to this hopelessly mentally ill defendant, Bazelon on appeal reversed the trial court's decision.

Bazelon's dislike for *M'Naghten* focused on two main shortcomings. First, like others, he emphasized that the *M'Naghten* test specifically turned on cognitive factors: whether a defendant understood right from wrong. Yet as Monte Durham exemplified, a seriously mentally disordered person might still know right from wrong yet be unable to act otherwise. In making his argument, Bazelon relied in part on the work of Sheldon Glueck, a psychoanalytically inclined criminal law scholar at Harvard Law School and the brother of Bernard Glueck, whom we have already encountered twice before, as both the psychoanalyst who treated Jerome Frank and one of the psychoanalytic experts in the Leopold and Loeb case. Bazelon quoted Sheldon Glueck for the "evident" proposition that "the [*M'Naghten*] test unscientifically abstracts out of the mental make-up but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders."[146] For Bazelon, the *M'Naghten* rule artificially segregated reason from all other mental processes, an approach out of sync with a psychoanalytic perspective that treated reason, emotion, and impulse as an integrated—if perhaps conflict-laden—whole.

The second main shortcoming of the prevailing *M'Naghten* rule related to the supplemental "irresistible impulse" test adopted in some states. Bazelon argued that the irresistible impulse test excluded criminal acts that were "coolly and carefully prepared" but nevertheless totally irrational. Sounding very much like Freud in his 1917 essay "Mourning and Melancholia," Bazelon argued that a depressed individual might believe "that a future of such degradation and misery awaits both him and his family that death for all is a less dreadful alternative."[147] In developing his critique of the irresistible impulse test, Bazelon relied on several leading psychoanalytic writers of the day, including Manfred Guttmacher, the author of a well-known treatise on psychiatry and someone who reappears later in this chapter as a close advisor to Herbert Wechsler on the Model Penal Code.[148]

One did not have to be a psychoanalyst to find the *M'Naghten* approach lacking.[149] But one did have to be psychoanalytically oriented to appreciate the new and broader rule Bazelon crafted to replace it. His test for establishing the insanity defense provided that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect,"

a determination to be made by a jury aided by expert psychiatric testimony.[150] Bazelon cited many psychoanalytic writers in support of his "product test," although the origins of the test lay in decisions of the New Hampshire Supreme Court from the 1870s, holding that, "[i]f the killing was the offspring or product of mental disease, the defendant should be acquitted."[151] Bazelon intended the product test to identify those situations when conduct was clearly not freely chosen.[152] The test satisfied psychoanalytically informed psychiatrists because it changed the focus of the inquiry from a moral assessment (whether the accused could distinguish between right and wrong) to a question of mental illness.

The *Durham* test thus put the emphasis where psychoanalysts thought it should be: on the mental health of the accused. Bazelon's approach reflected the view that "[m]ental disease is the peculiar reaction of the individual's personality to the total situation," a view that required as much information as possible about the defendant's life, mental and otherwise, to go to the jury.[153] The standard allowed for the introduction into evidence of a broad range of information concerning the individual's mental state and history, bestowing authority on members of the psychiatric profession, mainly psychoanalytically informed psychiatrists, to testify about the existence of a "mental disease or mental defect" and "productivity." *Durham* ensured that a much larger number of individuals would be found not guilty by reason of insanity than under the old *M'Naghten* knowledge test. At the time, Bazelon's opinion had broad effects on debates over criminal responsibility.[154] His emphasis on the individual's mental health—and the relaxing of criminal responsibility that it implied—propelled psychoanalytic ideas about criminal responsibility to the forefront of criminal law reform.[155]

Herbert Wechsler was the most prominent legal scholar of the time to reckon with Bazelon's *Durham* decision. A professor at Columbia Law School, Wechsler undertook the job of chief reporter for the American Law Institute's momentous project to develop a model criminal code, what one commentator called "the most consequential criminal code in the history of Anglo-American law."[156] Wechsler began work on the ALI's Model Penal Code in 1951 and did not finish until over a decade later. His interest in the new psychoanalytic psychology was first evident from an article that he

published in the *Harvard Law Review* in 1952, just as the project was getting under way. In this article, "The Challenge of a Model Penal Code," Wechsler emphasized that "the psychological and social sciences" provided a "sustained and fundamental critique" of the criminal law.[157] The psychoanalytic aspects of this critique included "the inhumanity [in] the narrow range in which the law accords importance to the causes and dynamics of criminal conduct rather than the nature of the proved offense"; the law's "unsound psychological premises such as 'freedom of will' or the belief that punishment deters"; law "that is drawn in terms of a psychology that is both superficial and outmoded, using concepts like 'deliberation,' 'passion,' 'will,' 'insanity,' 'intent' "; and the lack of a "rehabilitation" model in criminal sentencing. With respect to the last of these, Wechsler noted that there had been "some acceptance" that the law should view criminal conduct in therapeutic rather than punitive terms, "primarily as a symptom of a deviation that may yield to diagnosis and to therapy."[158]

Several psychoanalytically informed psychiatrists and scholars were part of the large advisory group working on the project. We have already encountered Sheldon Glueck, the Harvard Law School scholar on whose work Bazelon had relied. Glueck was an advisor on the project and someone whom Wechsler identified as offering an important psychological critique of the criminal law.[159] In his book *Crime and Justice*, Glueck argued that the criminal law should "utiliz[e] the insights that study of psychoanalysis gives into the intricacies of personality maladjustment."[160] In addition to Glueck, the advisors on Wechsler's project included Winfred Overholser, a proponent of psychoanalysis and author of *The Psychiatrist and the Law*, a book also relied on by Bazelon in *Durham*.[161] On the advisory board as well was Lionel Trilling, a prominent literary critic and the author of *Freud and the Crisis of Our Culture*.[162]

But the advisor who played the most central role in helping Wechsler with the question of criminal responsibility was Manfred Guttmacher, a well-regarded psychoanalytically oriented psychiatrist and the chief medical officer in the Baltimore city courts.[163] Guttmacher was the coauthor of *Psychiatry and the Law*, and (along with Overholser and Bazelon) one of the psychoanalytic experts asked to testify before Congress on the rights of the mentally ill in 1961.[164] In his book, Guttmacher took the position that the

criminal law must "recognize the role of the unconscious in the making of human judgments and in antisocial behavior."[165] Guttmacher had argued in an earlier paper that "the most careful study of the mental processes, leading to an understanding of the complex conscious and subconscious dynamisms underlying the behavior of offenders, is of real value to the court, to the probation department, and to the administrators of penal institutions."[166] Guttmacher was not outside the mainstream with regard to criminal responsibility. As he himself described it, "I do not subscribe to the radical lay doctrine that all criminals are mentally abnormal, nor did I agree with [the psychoanalyst] Franz Alexander that the majority of criminals owe their illegal activities to subtle, subconscious conflicts."[167] In Guttmacher's view, a psychoanalytic perspective on criminal responsibility was compatible with holding most people accountable for their criminal behavior.

Bazelon relied on Guttmacher's work in his *Durham* decision, and now Wechsler was deep in conversation with Guttmacher about whether the Model Penal Code should adopt some version of Bazelon's *Durham* test as a measure of legal insanity. Guttmacher's involvement in the Model Penal Code is evident from his 1953 memorandum entitled "Principal Difficulties with the Present [1953] Criteria of Responsibility and Possible Alternatives," which Wechsler included as an appendix to the 1955 draft of the Model Penal Code. The memorandum surveys the problems with the *M'Naghten* standard, and then advocates for the adoption of a rule similar to *Durham*'s. Much of the memorandum is psychoanalytic. Guttmacher explains the limits of *M'Naghten* by noting that "we have learned much about the unconscious masochistic needs of certain individuals to seek punishment and the overwhelming force of the unconscious in many seriously disordered patients."[168] A second appendix picks up where the memorandum leaves off: "Excerpts from Correspondence Between Dr. Manfred S. Guttmacher and Herbert Wechsler Relating to the Problem of Defining the Criteria of Irresponsibility in the Model Penal Code." In these excerpts, Wechsler thanks Guttmacher for his memorandum, which he had read "with great interest." Wechsler then asks Guttmacher for his views on the *Durham* rule: "Can I impose on you to give me your most critical reaction to the points that I have made [about the *Durham* rule]? Especially if you conceive that the

causality [*Durham*] test would have a meaning to a medical man that I have not perceived, I would appreciate your telling me at once."[169]

Ultimately, Wechsler supported a version of the rule that went only partway toward satisfying the concerns of the psychoanalysts. The Model Penal Code recognized the insanity defense for anyone lacking the capacity to know what he did was wrong or to conform his conduct to law. Mental illness in itself would not absolve a defendant of responsibility for his conduct. In May 1955, the year following Bazelon's decision in *Durham*, Wechsler submitted an official draft of the Model Penal Code to the ALI membership.[170] In comments to the section on the insanity defense, Wechsler expressly repudiated Bazelon's approach: "The draft rejects the formulation warmly supported by psychiatrists and recently adopted by the Court of Appeals for the District of Columbia [in *Durham*]." Wechsler explained that the *Durham* test was too broad, encompassing any situation in which, absent the mental disorder, the defendant would not have committed the act. Given "the concept of the singleness of personality and unity of mental processes that psychiatry regards as fundamental," only "very rarely" could it be said that the conduct was not a "product" of the mental disease or defect.[171]

With Wechsler's Model Penal Code, the psychoanalytic approach to criminal insanity taken by Bazelon was dealt a fatal blow. And as it turned out, Bazelon himself renounced the *Durham* rule twenty years later in *United States v. Brawner*, albeit for different reasons.[172] Bazelon became disheartened that the rule in practice had ended up taking the question of legal responsibility away from the jury and putting it in the hands of psychiatric experts. But while *Durham* itself was overruled, the questions that psychoanalysis raised for criminal responsibility—in particular, how to reconcile unconscious influences on behavior with the criminal law's presumption of free will—remained at the forefront of legal scholarship for decades to come.[173]

The Yale School

By the time Herbert Wechsler dealt a mortal blow to Bazelon's *Durham* decision, a different, and indisputably more successful, psychoanalytic effort was under way at Yale Law School. In the 1960s, Yale Law School was no

stranger to psychoanalysis; Jerome Frank had been appointed a visiting research assistant in 1932, the year after he published *Law and the Modern Mind*, and maintained a close association with the law school until his death in 1957.[174] But even before Frank, Robert Hutchins, dean of the law school from 1927 to 1929, drew extensively on psychoanalysis in laying out his vision for a psychologically informed law of evidence.

In a paper published in 1929, Hutchins demonstrated the significance of psychoanalytic ideas for the law of domestic relations. In this paper, "Some Observations on the Law of Evidence: Family Relations," Hutchins and his coauthor, Donald Slesinger, argued for the elimination of the rule that spouses cannot testify for or against each other in criminal cases.[175] The justification for the rule "was the necessity of marital harmony and confidence," based on a "conception of the home as a unit, with all the members dwelling in sacrosanct confidence and harmony."[176] As Hutchins described, the rule had led to "preposterous results." Even in cases of child abuse, the wife would not be permitted to testify against the husband, despite the fact that marital harmony had long since vanished. This preservation of the ideal of the "mediaeval family,"[177] according to Hutchins, flew in the face of the "disorganizing" effects of changing economic, religious, and social forces on the family.

Hutchins argued that, rather than disqualifying family members from testifying, the law should allow the jury to hear their testimony along with evidence of any bias resulting from the parties' relationship. "The courts assume that bias is always in the same direction," in other words, a bias in favor of the other spouse. But referencing the Oedipus story, Hutchins explained that "[m]yth and literature contain many suggestions of ambivalent attitudes toward those whom one is supposed to love."[178] The concept of marital ambivalence is deeply psychoanalytic, as Hutchins made clear: "Recent psychological investigation has shown that these are not literary exceptions, but may prove to be the general rule. It is insisted by psycho-analysts that the great interest in the Oedipus myth, for example, results from the fact that it objectifies an experience common to mankind."[179] These ambivalent marital attitudes, Hutchins argued, are "frequently unconscious."[180] Hutchins took from Freud the colorful example of "the woman recently married who,

while still professing great love for her husband, failed to recognize him across the street, and whose divorce revealed the trend of her emotion."[181] Without evidence being introduced to explain a spouse's unconscious ambivalence, the jury might be misled as to her true feelings. Hutchins was the first to see that psychoanalysis, in elaborating the "family romance" of early childhood desires and ambivalences, has special relevance for the legal field of family relations.

It was another early Yale Law School scholar, Edward Robinson, who in 1935 articulated the contribution psychoanalysis made to law in its early years: "The Freudian theory, however, has shown the possibility of viewing human nature with a new honesty and a new detachment; it has shown us how to look behind the rationalizations that men give of their own conduct and to view candidly any motive whatever that may be discovered here. Sex desire, personal ambition, feelings of insecurity, from which even men of science used to turn away their eyes, have become admitted normal ingredients of human life."[182] Not himself a strong proponent of psychoanalysis, Robinson nevertheless recognized the possibilities for applying psychoanalysis to the law. Together Hutchins, Frank, and Robinson laid the foundation for the pathbreaking psychoanalytic work that would be carried out by their family law colleagues at Yale in the years to come.

Starting in the early 1960s, the Yale legal scholar Joseph Goldstein began his psychoanalytic studies on the child. We already know that he brought the psychoanalytic tradition in law to its apex with the publication of his 1967 treatise *Psychoanalysis, Psychiatry and Law*, coauthored with Jay Katz and Alan Dershowitz. In a dramatic move, Goldstein invited Anna Freud, Sigmund Freud's daughter and a distinguished child analyst in her own right, to come to Yale Law School to collaborate with him on a series of books, the first of which, *Beyond the Best Interests of the Child*, was published in 1973.[183] A third coauthor, Albert Solnit, was a child psychoanalyst at the Yale Child Study Center and a major figure in child psychology. In their series of books, Goldstein, Freud, and Solnit repudiated the law's traditional best interests of the child standard, along with the law's deference to the biological tie between parents and children, in favor of what they termed "the least detrimental alternative for safeguarding the child's growth and development."[184] As

they explained, psychoanalytic theory "provides a valuable body of generally applicable knowledge about a child's needs . . . for unbroken continuity of affectionate and stimulating relationships with an adult."[185]

Goldstein, Freud, and Solnit argued that law must recognize the child's deep and enduring emotional tie to her "psychological parent," whether that person was a biological parent or not. "A psychological parent role is based on a day-to-day interaction, companionship and shared experience." The role can never be fulfilled "by an absent, inactive adult, whatever his biological or legal relationship to the child may be."[186] In so arguing, the Yale authors threatened a long-standing regime of parental rights rooted in biology and, to a lesser extent, marriage. No one had quite yet put children's interests front and center in the same way as these psychoanalytic thinkers did. The implications were widespread for the law of neglect, abuse, foster care, adoption, delinquency, juvenile crime, and custody.

But Goldstein, Freud, and Solnit's assault on parental rights met with a hostile audience. Few courts were prepared to tell biological parents that their rights had been transferred to third parties, such as grandparents, stepparents, or other caregivers. Moreover, Goldstein, Freud, and Solnit took the extreme position that, where the parents are separated, full custody should be given to one parent who would exercise control over the second parent's access to the child. In their view, if the choice "is between two psychological parents . . . the least detrimental standard would dictate a quick, final and unconditional disposition to either of the competing parties."[187] While the psychological parent theory has been widely influential, no court has gone so far as to strip an obviously fit parent of his or her parental rights. Indeed, doing so would likely violate the Constitution's protection for parental rights under the Due Process Clause.[188] And today, psychoanalysts recognize the importance of children's attachment to multiple caregivers in their lives. But the psychological parent theory, with its recognition of the child's interests in maintaining relationships of deep emotional connection, remains a core psychoanalytic idea. This theory continues to influence judicial decision-making, lending support to the claims of nontraditional caregivers, such as same-sex partners of biological parents, to legally recognized relationships with children based on close emotional ties.

In their capstone treatise, *Psychoanalysis, Psychiatry and Law*, the Yale authors Katz, Goldstein, and Dershowitz wove together legal decisions, psychoanalytic writing, and legal scholarship to produce a complex tapestry of clinical and theoretical legal issues relating to "the psychoanalytic image of man." The scope of their inquiry went well beyond Goldstein's core interest in family law to encompass the law of wills, criminal procedure, copyright law, and criminal law. But as described earlier,[189] the appearance of this monumental work was a turning point: a symbol of the height of psychoanalysis's decades-long fight for legal status at the same time that it signaled, however subtly, its imminent decline. The fall-off was not immediate. Goldstein published his piece "Psychoanalysis and Jurisprudence" a year later in the *Yale Law Journal*, in which he addressed the value, but also the limitations, of a psychoanalytic perspective for law.[190]

By the mid-1970s, the psychoanalytic tradition in law was clearly on the wane. But scholars at the Yale Law School remained enthusiastic about psychoanalysis for longer, largely due to a dynamic collaboration with the psychoanalytically oriented Yale Child Study Center. Although psychoanalysis had failed to make an enduring difference in law's approach to criminal responsibility, it did make lasting inroads into the legal rules governing families and children. But as the work of this psychoanalytically talented generation of Yale scholars passed into history—that of Joseph Goldstein, Jay Katz, Albert Solnit, and others—so too did Yale Law School's prominence as a center of psychoanalytic study.

We have already canvassed the external factors that contributed to the decline of psychoanalytic thinking in the law: the rise of cognitive psychology; developments in managed care; the cultural backlash against Freud; breakthroughs in neuroscience, genetics, and psychotropic medications; and the psychoanalytic profession's overconfidence and resistance to scientific research. But proponents of psychoanalysis within the law also grew weary of the fight. Over its first few decades, the tradition of psychoanalysis and law proved destabilizing to certain foundational legal concepts, such as criminal responsibility and parental rights, and leading figures like Bazelon and Alan Stone lost faith in the law's ability to manage these destabilizing ef-

fects. Yet closing one's eyes to psychoanalytic insights into the unconscious proves no better. We do not further the ends of law—we do not promote fairness, justice, or equality—by denying what is distinctly human about ourselves. All of the early legal thinkers discussed in this chapter recognized the relevance of psychoanalytic ideas to multiple areas of law: free speech, children's culpability, the insanity defense, judicial decision-making, and family law. While psychoanalysis itself changed greatly over this time period, the questions psychoanalysis was raising for lawyers, scholars, and judges—questions concerning free will, choice, speech, children's responsibility, and a host of other issues—are still vitally relevant today.

Not all psychoanalytic writing in law has ground to a halt. As laid out earlier, psychoanalytic work is being carried out today by a range of legal scholars in the area of law and humanities. But the era of psychoanalysis being viewed as a tool for the radical transformation of legal theory and doctrine has long passed. This retrenchment, while disheartening in some ways, nevertheless opens up important new ways of thinking. We are forced to sharpen our inquiry: Where exactly can psychoanalytic ideas make a real and lasting contribution? In what areas of law does psychoanalysis have the most to offer? In what ways does psychoanalysis join up with work being carried out in scientific psychology, particularly cognitive psychology and neuroscience? This reassessment affords us the opportunity to reflect more self-consciously on the claims—some still relevant and some not—that psychoanalytic legal scholars have made over the last century. We can identify with some precision the important areas for psychoanalytic study. The subjects of intimacy and aggression—the core arenas of psychoanalytic study—provide the starting parameters. Most of the legal issues taken up in the following chapters fall within or around these two core domains of human experience. But the effort undertaken here will likely create new avenues for future study. While law and humanities scholars have kept the psychoanalytic tradition in law alive, the effort needs to broaden into mainstream legal thinking, where it once was and should be again.

THREE

Psychoanalysis and Free Will

Psychoanalysis is known to have a "free will problem," one that poses a seemingly insurmountable barrier to the application of psychoanalytic ideas to criminal law. Free will is a foundational concept in the law.[1] We take it as a necessary postulate of our legal system that most individuals are in control of their actions and, consequently, can and should be held legally accountable for those actions. Conventional wisdom holds that psychoanalytic insights about the unconscious directly conflict with law's presumption of free will, for how can a person exercise free will while subject to the unavoidable and unrelenting control of the unconscious? As Chief Justice Joseph Weintraub of the New Jersey Supreme Court described the problem, a psychoanalytic perspective tells us that "the conscious is a puppet and the unconscious the puppeteer."[2] Psychoanalytic ideas about the influence of the unconscious on our waking lives would thus seem to render successful collaboration between law and psychoanalysis impossible.

The conclusion that law and psychoanalysis are in fundamental conflict over free will, however, is simply wrong. The idea rests on a serious misunderstanding of psychoanalysis and its ideas about the unconscious. A more accurate psychoanalytic perspective avoids the seemingly intractable clash between the law's ideal of free will and the reality of unconscious life. As we will see, psychoanalysis recognizes and fosters a capacity for human agency of its own, more constrained but nevertheless central to its portrait of the psyche. Far from undermining law's conception of free will, psychoanalysis is compatible with—indeed fortifies—a legal system that sometimes must assign responsibility where conscious knowing intent or choice is lacking. Properly formulated, a robust psychoanalytically informed view of the unconscious helps to reconceptualize the law's presumption of free will in ways

that further the law's highest goals and aspirations. A well-developed psychoanalytic theory of human agency leads us toward a more realistic, less harshly punitive, and more just criminal jurisprudence.

The Conflict Thesis

Our legal system rests on the commonsense idea that individuals should only be held criminally accountable for acts that were the product of their conscious choice. As the Supreme Court has reiterated on many occasions, "wrongdoing must be conscious to be criminal."[3] With few exceptions, the criminal sanction is reserved for those who act with a purposeful state of mind: knowingly, intentionally, willfully. "State of mind" or *mens rea* requirements reflect the basic proposition that criminal sanctions should be coextensive with moral responsibility. The notion of conscious wrongdoing is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[4] If an individual acts under duress, when insane, or while physically unconscious, it is hard to say that he or she should be morally blameworthy—and hence criminally responsible—for the ensuing harm. Of course a relatively small number of crimes are based on negligent rather than intentional acts. But criminal negligence, along with strict liability crimes where the defendant's state of mind is totally irrelevant, are exceptions that prove the rule. As these exceptional areas of criminal liability grow in number and prominence, in fact, they threaten the traditional retributivist paradigm that equates criminal responsibility with moral wrong.

Establishing state of mind as an element of criminal liability in every case would impose a significant burden on the state, for the obvious reason that direct evidence of subjective intention or knowledge does not exist. Sometimes mental state can be easily discerned from behavior and statements, but not always. The law's presumption of free will substantially eases what would otherwise be a weighty evidentiary burden. In the absence of insanity, incompetency, or incapacity, the law presumes that individuals have the ability to exercise conscious control over their behavior. Chief

Justice Weintraub described the presumption in 1965: "For protection of society the law accepts the thesis that all men are invested with free will and capable of choosing between right and wrong."[5] The presumption of free will—that individuals have the capacity to make conscious decisions about whether and how to act—eases the evidentiary burden and legitimates the moral foundation of the criminal law.

The presumption of free will in criminal law fits within a broader constitutional framework respecting the individual's rights to self-determination and personal autonomy.[6] The Due Process Clause protects the adult individual's freedom of choice in matters fundamentally affecting a person, particularly in the realm of intimate relationships and reproduction.[7] The Supreme Court assigns parents the duty to raise children with the skills of autonomous choice that most adults feel give their own lives meaning.[8] The First Amendment right of free speech bestows on individuals the right to choose freely when and how to express themselves. Even the right to religious freedom—which we might associate with received beliefs rather than free choice—becomes a matter of individual preference under our constitutional regime. The First Amendment protects our right to choose whether and how to believe.

But the presumption of free will is more than an evidentiary device or normative ideal. It is also a legal fiction. The presumption ensures that some individuals will be held accountable for their behavior in spite of their actual state of mind. As early as the late eighteenth century, courts and scholars struggled with the fact that individuals are not always freely choosing actors, but often are affected by psychological forces outside their conscious control.[9] The law resolves this dilemma by erecting a legal fiction: absent coercion, duress, or incapacity, the law treats individuals "as if" they have free will, whatever the real state of affairs may be in any particular case. An intoxicated individual oblivious to the risks of driving will nevertheless be held responsible for any ensuing accident; a person who intentionally assaults another, not believing he will injure her, will be prosecuted for manslaughter; an individual who remains ignorant of the drugs in the trunk of her car will nevertheless be guilty of drug running. We can readily identify many more everyday instances where the presumption of free will contradicts the troublesome real-

ity of subjective experience. Confusion, emotional distress, or sheer naïveté might all produce actions devoid of any actual consciousness of wrongdoing. Common sense tells us that early childhood experience, character traits, and learned habits can lead individuals to take actions without conscious deliberation. In all these cases, the law presumes a willing agent engaging in consciously chosen behavior despite the individual's real state of mind.

Knowing all this, we nevertheless accept the law's presumption of free will because we appear to have no other choice. Jettisoning the presumption of free will would arguably sanction antisocial behavior, upend social order, and justify paternalistic governmental intervention. The presumption of free will thus fortifies the moral foundations of the criminal law; it serves the law's fundamental need to hold people accountable for their conduct, despite the fact that a person's choice may have been impaired by factors beyond his or her control. We can comfort ourselves with the idea that the demands of civilized life justify the price, and so an unfortunate few necessarily will be subject to the punitive power of the state based on a misplaced presumption that they freely committed a criminal act.

But what if the unfortunate few turn out to be most of us? Psychoanalysis goes well beyond insanity, incompetency, and duress to question whether *any* decisions can be said to be the product of a free and unencumbered will. It would only be a slight exaggeration to say that psychoanalysis operates from the opposite presumption: that individuals largely lack conscious control over their everyday thoughts and behavior. In positing the existence of unconscious motives, beliefs, and wishes, psychoanalysis upends the law's central idea of the conscious, freely choosing self. It threatens to dismantle the law's "as if" strategy for dealing with the messy reality of subjective life. The psychoanalytic model instead centers on the many unknown factors driving our behavior. It forces us to confront questions about law's presumption of free will and the entire legal apparatus resting upon it. If we are not consciously choosing agents most of the time, then how can we be held morally responsible for our actions as if they resulted from deliberate and intentional choice? Law and psychoanalysis thus appear to be on a collision course, the one positing conscious free will and the other insisting on the unconscious determinants of behavior.

Judges, lawyers, and legal scholars have long recognized the challenge that psychoanalysis poses to law's presumption of free will.[10] In a 1945 committee report of the American Bar Association, the Special Committee on the Rights of the Mentally Ill warned that "the doctrines of psychoanalysis tend toward determinism," calling for "careful consideration" of the psychoanalytic proposition that "free will does not exist."[11] In commenting upon the report, the psychoanalyst Robert Knight concluded that the committee "fear[s] that the deterministic view implies an encouragement to irresponsibility, and that crimes will go unpunished and criminals unconvicted [*sic*] if the culprits can be successfully defended on the basis that they could not help doing what they did."[12] As yet another early commentator put it, "[l]awyers and psychiatrists are thus prone to sterile deadlock on the question of moral fault and the retributive function of the criminal law."[13] This "sterile deadlock" extends well beyond criminal law to virtually every area of civil adjudication. Apart from rare pockets of strict liability, the law holds people accountable for their actions because it relies on the elemental idea that people, in any given circumstance, have a choice. Psychoanalysis tells us—or at least we *think* it tells us—that the opposite is true.

This perceived incompatibility between law and psychoanalysis rests on widely shared but mistaken ideas about the psychoanalytic unconscious. As will be explained in this chapter, the ideas that fuel the conflict thesis boil down to three: that the psychoanalytic unconscious is deterministic; that it is irrational; and that it is opaque to understanding. If the psychoanalytic unconscious really were deterministic, irrational, and opaque, then we would be right to think it incompatible with legal responsibility. Yet these three baseline assumptions about the unconscious do not accurately represent psychoanalytic ideas about the mind and its operations. This chapter argues that the notion of free will is, in fact, perfectly compatible with a proper psychoanalytic understanding of the unconscious and its role in human behavior. Indeed, even more than that: properly understood, psychoanalysis gives us the tools for modifying the law's ideal of free will to better achieve law's aims of individual fairness and systemic justice. The implications of a psychoanalytically informed conception of free will for law are manageable yet far-reaching.

The Doctrine of Willful Blindness

Carmen Heredia was arrested by United States authorities for possession of marijuana with intent to distribute after police at the Mexican border found three hundred and fifty pounds of the drug in the trunk of the car she was driving.[14] Heredia was returning to the United States from a day trip to Mexico, where she had brought her mother for a dentist appointment. She borrowed her aunt's car for the return trip, which included her mother and other relatives as passengers. As she prepared for their return, Heredia asked her aunt about the strong detergent smell that she detected in the car. Her aunt explained that she had spilled Downy fabric softener in the vehicle a few days earlier. Heredia also was aware that her mother was visibly nervous and carried a large amount of cash despite being unemployed. At the border, the agents noticed a "very strong perfume odor" and searched the trunk, finding the marijuana covered with dryer sheets. The jury concluded that Heredia had harbored a strong suspicion that drugs were in the car but had deliberately avoided learning the truth. Under the doctrine of "willful blindness," Heredia was found guilty of knowingly possessing a controlled substance with intent to distribute, even though she did not have actual knowledge of the facts relevant to the crime.[15]

The doctrine of willful blindness—with its joining of willfulness and ignorance—opens the door to a psychoanalytic inquiry into the operations of free will in criminal law. The doctrine of willful blindness goes by many other names: deliberate ignorance, conscious avoidance, and even the "ostrich rule." The classic case of willful blindness is an individual who, when confronted with strong evidence of criminal behavior, adopts an attitude of intentional ignorance—"Don't tell me, I don't want to know"—and then proceeds to facilitate the criminal behavior in some way. As the *Heredia* court explained, courts interpret the word "knowingly" to include "the state of mind of one who does not possess positive knowledge only because he *consciously* avoided it."[16] To establish willful blindness under the court's formulation, the government must prove beyond a reasonable doubt that the defendant had knowledge of a high probability that the criminal conduct was occurring but took deliberate steps to avoid learning the truth.[17]

The *Heredia* court emphasized that there must be a calculated choice to avoid learning the truth. If Heredia knew enough to choose deliberately to avoid learning the truth, then she knew enough to be convicted of the crime. Under the willful blindness theory, Heredia could be held morally accountable for her decision not to inquire further because she suspected something was wrong but chose not to ask.

The term "willful blindness" thus refers to an individual's conscious decision to remain ignorant of the criminal nature of her conduct. Heredia argued in defense that the doctrine required that the government prove a further element: that Heredia's motive in remaining ignorant was to "avoid responsibility in the event of discovery."[18] Requiring this element of proof would have resulted in acquittal because there was no evidence of her motive to avoid prosecution. The court rejected Heredia's motive argument, finding that the doctrine's requirement of deliberateness was sufficient to ensure that only those intending to avoid the truth are held criminally liable. "The *reason* the individual fails to take that final step [of confirming knowledge] has no bearing on whether he has sufficient information so he can properly be deemed to 'know' the fact."[19] The motive need only be a desire not to know, rather than the specific desire to evade the legal consequences of actual knowledge, that is, criminal prosecution.

What the *Heredia* court did require is a *calculated choice* to remain ignorant, proof that "[s]he suspected the fact; [s]he realized its probability; but [s]he refrained from obtaining the final confirmation because [s]he wanted in the event to be able to deny knowledge."[20] The *Heredia* court at different times refers to a deliberate failure to investigate, a deliberate failure to take the "final step" to confirm knowledge, and a deliberate choice to avoid learning the truth. Heredia's jury must have believed beyond a reasonable doubt that she consciously turned a blind eye to the reality of the drugs in the car. Conscious choice was required: to hold Heredia liable based solely on her suspicions about drugs in the car would improperly transform the "knowledge" element into a lower state of mind, such as negligence or recklessness. Heredia would have been negligent if a reasonable person with her suspicions *should have known* that drugs were in the trunk of the car. But the statutory standard of criminal liability in this case was not negligence:

the proscribed conduct must have been undertaken knowingly. And for this, the government had to prove beyond a reasonable doubt that Heredia made a conscious and deliberate decision not to inquire further into the truth of the odor emanating from the trunk of the car.

As with all state of mind elements, the condition of willful blindness is difficult to establish beyond a reasonable doubt. The prosecution must prove that a defendant's ignorance of the real facts was the result of deliberate avoidance rather than mere careless obliviousness or similar factors. Yet the jury was in no position to discern with certainty whether Heredia failed to inquire out of a calculated desire not to know or because she simply failed to connect the dots. Heredia's state of mind was, of course, not directly accessible to the jury. In proving state of mind beyond a reasonable doubt, the government in many cases must meet its burden based on indirect evidence, which sometimes, as with Heredia, boils down to little more than an unstated assumption of knowing choice: given the overpowering smell emanating from the trunk, we presume that Heredia made the conscious decision not to inquire further into the issue of the Downy softener because she did not want to know the truth.

The presumption of free will—that we are conscious, choosing actors—operates to impose a criminal state of mind upon an unknowable subjective reality. In this case, this fiction resolves the evidentiary dilemma by imputing conscious knowledge. Yet the presumption of free will—the presumption that Heredia made a conscious decision not to inquire—silently shifts the *mens rea* standard from a subjective to an objective one. The *Heredia* court implied that Heredia's blindness must have been deliberate because any person would have consciously processed suspicions of criminality under the circumstances. Direct evidence of Heredia's state of mind was impossible, and therefore the jury was entitled to base its verdict on what a reasonable person in Heredia's position would have been expected to know in her conscious mind.

As it operates in these circumstances, therefore, the presumption of free will flattens the reality of Heredia's subjective experience. It does not leave room for the possibility that Heredia might actually have been wholly unaware of her avoidance tactics. "Reasonable persons" do not repress the facts;

they are presumed to be fully aware of what goes on in front of them. Yet the evidentiary record in Heredia's case would support the conclusion that she herself may never have made a conscious, deliberate choice to avoid the truth. Heredia had suspicions about the odor in the car, and in fact made some inquiries; she was told that her aunt had spilled Downy fabric softener. It is entirely possible, perhaps even probable, that Heredia never consciously decided to avoid knowing what later turned out to be the truth. She very well may have accepted the Downy excuse for reasons wholly outside her conscious awareness. Let us consider the possible factors weighing on her actual subjective experience.

Heredia was not transporting strangers. Her actions that day were embedded in a web of familial relationships. Her overriding desire at the time may have been to preserve good relationships with her mother and aunt. Without ever knowing it, she may have been preoccupied with the concern that further inquiry into the contents of the trunk would have been taken by her aunt (and mother as well) as a profound transgression, an act of insolence or family betrayal. Alternatively, or correspondingly, she may have been unable to admit to herself the possibility that her mother and aunt were not the people she believed them to be: they were in fact criminals. Perhaps Heredia idealized her mother and did not want to accept the morally repugnant idea that her mother was a drug runner. Heredia may have avoided knowing the truth for the same reasons that Heredia's mother and aunt were attempting to conceal the truth from her: knowledge of their criminality might have destroyed their family. Other plausible hypotheses exist. Heredia's repression of the facts might have reflected a desire not to confront her mother and aunt: perhaps she feared her mother would emotionally retaliate. Common defenses such as denial and rationalization very often explain why people will ignore facts and circumstances obvious to an "objective" observer. Indeed, had an outsider been present to point out the incriminating facts to Heredia as she prepared to depart Mexico that day, she might still have strongly resisted seeing the truth. This is blindness, to be sure. But it is the very opposite of *conscious* blindness. Hidden motives, repression, and resistance might have worked to keep Heredia in a state of *unconsciously* driven ignorance.

We need not be psychoanalysts to recognize the fact that people frequently repress a truth that is staring them in the face. Many individuals faced with overwhelming evidence of corruption or other misconduct remain consciously ignorant of the truth. They might "know" at some level about the high probability of criminal behavior, but they repress these thoughts from conscious awareness. Surprisingly, the dissent in the *Heredia* case unwittingly gives us the best illustration of the power of unconscious repression.[21] Judge Susan Graber dissented from the majority decision on the ground that the law requires a knowing or intentional state of mind, which, Judge Graber concluded, was likely the case with Heredia. In arguing that the willful blindness instruction to the jury was unnecessary for Heredia's conviction, Judge Graber illustrated her point with the ill-chosen example of an adulterous husband: "[I]f your husband comes home at 1:00 A.M. every Friday (after having left work at 5:00 P.M. the day before as usual), never reveals where he has been, won't look you in the eyes on Fridays, and puts Thursday's shirts in the hamper bearing lipstick stains, your friends will agree that you 'know' he is having an affair even if you refuse to see confirmation."[22]

Judge Graber could hardly have picked a better example to undermine her point. Some spouses would indeed manage to rationalize away the lipstick stains even in the face of overwhelming evidence of infidelity, as Judge Graber's hypothetical spouse did when she "refused" to see the truth. Although long aware at some level of the incriminating evidence, spouses often are truly shocked when eventually confronted by the unavoidable truth. Their conscious minds had been unable to accept the reality of their spouse's betrayal. The repression can be motivated by different psychological forces, from a simple desire to sustain a fantasy of love to more complicated urges for self-punishment. Whatever the motive, Judge Graber's adultery illustration undermines her view that blindness to the facts always involves a deliberate avoidance of the truth. Ironically, adultery may be the paradigmatic example of a situation in which a person would be *most* likely to deny the facts, even to herself.

The bedrock conundrum thus presents itself: on the one hand, once we acknowledge the psychoanalytic truth that individuals often act for reasons

outside their own conscious awareness, how are we to assign moral (and thus legal) responsibility for misconduct? How can we hold individuals legally accountable for intentions they did not in fact have? On the other hand, how can our society and its criminal justice system function without the presumption of free will? This conundrum would appear to force us either to abandon the idea of moral responsibility as the foundational basis for criminal law, or to let a great number of criminal defendants go free. On purely pragmatic grounds, psychoanalysis would appear to present law with an untenable situation: it puts us in the position of absolving many defendants of personal accountability; it clashes with our intuitive sense of ourselves as choosing, freely willing individuals with control over our own lives; and it aims to understand rather than judge. Is a psychoanalytic perspective on the unconscious simply incompatible with a criminal justice system that ultimately must adjudicate people innocent or guilty, and *punish*? Do we let Heredia go free?

Law's Willful Blindness

It is readily apparent that the criminal law engages in its own form of willful blindness, in this case blindness to the irrefutable evidence of unconscious life. The *Heredia* dissent itself denies what we all know: the last person to suspect infidelity is often the betrayed spouse. A psychoanalyst would say that law's presumption of free will functions as a motivated disavowal of the realm of meaning lying just beneath surface awareness. The presumption of free will operates to repress the truth of unconscious life and its implications for moral responsibility. Despite decades of clinical evidence for the existence of the unconscious, despite the everyday experience of its effects, the law responds with: "I don't want to know!"

At first blush, the reason for law's blindness—the law's repressed motive, we might say—seems to emanate from the same dynamic fueling the conflict thesis: that the unconscious is incompatible with law's need to hold individuals accountable for their behavior. The conflict thesis posits that if all behavior is the product of unconscious factors and motives, then law has no basis for imposing legal liability. Given this thesis, the doctrinal response

("I don't want to know") allows law to maintain its claim to being a system premised on the individual's moral responsibility rather than authoritarian fiat. We presume free will in order to maintain a criminal justice system that holds people, however blind to their own motives, morally and legally accountable for their behavior. The psychoanalyst Franz Alexander and the lawyer Hugo Staub argued long ago that the presumption of free will is merely a "tactical justification" for holding people liable in light of the absence of conscious control over their own behavior.[23]

Yet our rush to conclude that the unconscious is incompatible with the notion of free will is misguided. Upon closer inspection, we discover that the conflict thesis seriously misapprehends the psychoanalytic unconscious and its role in psychic life. Why do we assume that the idea of the unconscious is inherently incompatible with law's commitment to free will? As already noted, we make this assumption because conventional wisdom tells us that the psychoanalytic unconscious has three attributes: it is deterministic, it is irrational, and it is opaque to understanding. Any one of these three features would appear to rule out legal responsibility. But a closer look at the underlying conceptions of determinism, irrationality, and opacity of mind in psychoanalysis tells a different story. There is, in fact, room for a reconciliation between law's presumption of free will and the psychoanalytic model of the unconscious that opens up new ways of thinking about legal responsibility.

Determinism

The conflict thesis treats the psychoanalytic view of the unconscious as deterministic in the sense that all human behavior is driven by a chain of factors beyond an individual's conscious control. The issue was addressed early in the history of psychoanalysis. In 1931, Alexander and Staub dismissed the concept of free will as "an expression of the narcissistic wish" that represses the psychoanalytic insight into "the human psychic apparatus as a system which is fully, and without a single gap, determined by psychological and biological causative factors."[24] The prominent psychoanalyst Robert Knight argued in 1946 that psychoanalysis is a fully deterministic science leaving no room for anything more than a subjective illusion of free will.[25] Hard

determinism—the idea that all mental activity is causally and inevitably determined by prior mental events—haunts psychoanalysis to this day. Yet hard determinism in this sense is not an accurate description of psychoanalytic thought.

In psychoanalysis, hard determinism conveys the idea that an individual cannot intervene in the mental chain of causation linking his past to his future; the individual, in other words, lacks agency to alter the psychically determined unfolding of thoughts and actions. One could certainly find support for this version of determinism in some psychoanalytic writing. The philosopher John Hospers maintained that the individual's "conscious will is only an instrument, a slave, in the hands of a deep unconscious motivation which determines his action."[26] Clarence Darrow brought a psychoanalytic brand of hard determinism into the courtroom during the famous Leopold and Loeb case discussed in chapter 2. At times Freud himself sounded like a hard determinist. In explaining why he adopted the method of free association—by which a patient says everything that comes to mind—Freud wrote, "A strong belief in the strict determination of mental events certainly played a part in the choice of this technique as a substitute for hypnosis."[27] Freud's method of free association was not actually so free at all. Every word spoken by the patient was understood to be caused, so to speak, by some antecedent thought, memory, or desire.

But we should not be too quick to brand Freud a hard determinist. The fact that words and behavior have unconscious meaning does not lead inexorably to the conclusion that this meaning is causally fixed. Freud was contrasting determinism, not with free will, but with indeterminism, in other words, with randomness or arbitrariness. To Freud, thoughts and actions that on the surface appear utterly without meaning are nevertheless explicable at a deeper level. And the uncovering of meaning does not necessarily reveal the future. As one commentator observes, "[w]hen Freud said mental life was determined, he meant only that it was correlated with its antecedents."[28] Freud considered psychoanalysis to be "a retrospective science, not a predictive one."[29] To Freud, while we are the products of our biological drives and early experiences, our lives are not necessarily fated to unfold in a predestined way.

For Freud, psychoanalysis as a clinical treatment was the starting point for all inquiry into the mind. And what psychoanalytic treatment indisputably shows us is that individuals can, through effort, alter the course of their lives. Despite the air of hard determinism about his theory, "Freud did see free-moving elements in character."[30] His theory of the reasoning ego—the more cognitive, self-reflective part of ourselves—explicitly made room for the idea of individual agency. At points in his writing, Freud described the ego as the site of agency and psychoanalysis as the treatment designed to foster it. As he wrote, psychoanalysis aims "to give the patients ego freedom to choose one way or the other."[31] Freud's famous pronouncement, "Where id was, there ego shall be," is an homage to the development of some meaningful measure—however restricted—of agency.[32] His picture of the human condition may have had something of tragic fate about it, increasingly so as he developed a theory of the death drive in the aftermath of World War I, but he never lost faith in the power of the individual to turn neurotic suffering into ordinary unhappiness.[33] As psychoanalysts now explain, "[a]ll psychoanalytic treatment seeks to increase the patient's sense of agency in terms of an increased capacity for choice."[34] Patients often come into analysis paralyzed by their neuroses, unable to do much more than respond passively to the world and to inner forces. Psychoanalytic treatment intervenes to overcome the seemingly fated trajectory of psychic anguish.

Psychoanalytic treatment brings into focus the essential connection between personal agency and the process of self-examination. It is through some measure of self-reflection that the individual intervenes in the mind's causal trajectory and becomes an agent of his or her own life.[35] Self-reflection involves a splitting within the psyche between the observing self and the observed parts of the self. A more traditional analyst facilitates this process of self-reflection through interpretation of the patient's words and actions. In the view of many analysts, including Freud, interpretation stimulates an increasing sense of control—of agency—over one's life. Interpretation moves the patient to break free from unconscious habits of thought and behavior. The analyst's interpretive interventions cannot properly be characterized as mere events in a causal chain. Rather, an interpretation by the analyst *disrupts* the patient's flow of free association and, therefore, her settled way of

being. Interpretations do not so much act upon the patient as stimulate the patient to desire: to become curious about herself, to wonder, to open up the space for new ways of thinking and acting. In psychoanalysis, the process of self-reflection increases the span of human agency, opening the door to a conception of free will.

Because interpretation lies at the center of the classical psychoanalytic model, one might surmise that the operative concept of agency in psychoanalysis turns exclusively on reason. That was Freud's early thinking; that reason alone would convince the patient to change settled habits of thought. But through his clinical work, and in particular his failed treatment of the young Dora, one of his earliest cases, Freud came to see that agency in a psychoanalytic sense requires something more.[36] Freud understood that, for a psychoanalytic treatment to work, for self-reflection to take place, the patient must be *motivated*, and patients become motivated by being libidinally—in other words, emotionally—invested in the work. In psychoanalytic treatment, curiosity about oneself emerges with the transference: the development of a sense of agency is fueled by strong feelings for and about the analyst.[37] This desire for the analyst can sometimes erupt in erotic longings, but more productively expresses itself in the desire to work with the analyst in the mutual project of understanding the patient's mind. Freud developed a clinical treatment that stimulates the individual's desire to wonder about, understand, and ultimately control unconscious forces. Desire combines with reason—transference with interpretation—to initiate self-reflection and bring about change.

Modern object relations psychoanalysts—often working with patients struggling with more serious illnesses than the classical neuroses—might understand the process by which self-reflection brings about change in slightly different terms. Object-relations psychoanalysts might disagree over the particulars, but overall they are more likely to emphasize the relationship between the analyst and patient as an important factor in fostering psychic change. But in many contemporary psychoanalytic treatments, interpretation focuses on how the patient's unconscious wishes and needs get played out in the relationship with the analyst. Rather than being emotionally abstinent, a contemporary psychoanalyst is more likely to acknowledge and give

voice to her own feelings, the so-called countertransference. Change is understood to happen as the patient comes to see her maladaptive ways of relating to the analyst and, as a consequence, other people and the world. As in more classical work, object relations analysts help the patient to break free from these fixed, unconscious patterns of thought and behavior.

While psychoanalysis offers a philosophy of mind deeply committed to notions of agency and choice, it does not rely on naive conceptions of free will. To the contrary, psychoanalytic agency is deeply constrained, more in the image of a person swimming deep beneath the water, struggling to reach the surface. From a psychoanalytic perspective, our capacity for self-examination opens the door to some meaningful measure of choice freed from the shackles of unconscious forces. And as a clinical treatment, psychoanalysis presents an opportunity for altering the course of a life through reasoned self-reflection. The expansion of our capacity to be consciously acting agents in the world often emerges in the aftermath of action, when we stop to ask, "What have I done?" We become self-reflective agents the moment we become curious about knowing our inner lives. And it is this measured capacity for choice through self-reflection that dovetails with the law's idea of free will and dispels concerns about psychoanalysis as an irredeemably deterministic theory of mind.

Irrationality

The idea that the psychoanalytic unconscious is a cauldron of irrational drives and wishes supports the thesis that psychoanalytic theory is incompatible with free will. If our unconscious thoughts, feelings, and desires are irrational—if they resist all logical meaning—then our unconscious lives would seem by definition to be at odds with the idea of conscious control over our behavior. Our choices are influenced by factors that make no sense. In this way, the unconscious would pose the same barrier to free will as insanity. Yet once again, we find that the conflict thesis rests on profoundly mistaken views about psychoanalysis and its notion of the unconscious.

The irrationality of the unconscious appears to us in words and behavior that mysteriously contradict our conscious intentions and beliefs. For example, we are irrational when we intend to visit our parents but end up at our

in-laws' house instead. We act irrationally when we mean to say, "My, you look nice," and what we say instead is "Wow, why are you wearing that unflattering dress?" Less lighthearted forms of irrationality, too, can plague our everyday lives. We suffer from a writing block when we consciously want to finish our book. We sabotage love relationships and then suffer terribly from regret. We convince ourselves that a good friend secretly wants to do us harm. We cling to parents who abused us as children. We mysteriously are fired from job after job for angry insubordination. We experience profound depression upon getting good news. We feel guilt despite a false accusation of wrongdoing. Our unconscious appears to sabotage our conscious, controlled, orderly lives, disrupting our plans and wreaking emotional havoc on our inner world.

As these examples illustrate, the unconscious is typically thought of as "irrational" because the common manifestations of the unconscious—our frustrations, fears, and symptoms—are so contrary to our conscious, reasoning selves. But to conclude that these mysterious thoughts, feelings, and desires lack rational meaning reflects a deep misunderstanding. Psychoanalysis rests on the fundamental proposition that these unconscious intrusions on waking life have their own logic. Freud's greatest contribution to psychology was to show that symptoms, dreams, and fantasies all have meaning, however disguised that meaning might be. Our unconscious encompasses thoughts and feelings relating to instinctual desires, such as longing for or hatred toward others, somatic memories of infant experiences, repressed emotions and fantasies in conflict with conscious values and beliefs, and superego tendencies toward harsh self-criticism and self-destructive wishes. Deep-seated patterns of how we relate to others, derived from early caregiving attachments, color our unconscious lives. Unconscious meaning is often difficult to discern because it can be grasped only indirectly through its manifestation in dreams, symptoms, slips of the tongue, free association, and other pathways to the surface. But, Freud taught us, it exists.

Freud's ideas about what makes the unconscious appear irrational have largely withstood the test of time. As he explained, the unconscious appears in the form of "primary process" thought: there is a *timeless* sense to it, as when feelings from an early age coexist with adult feelings ("I am an aban-

doned child"); it allows for wishes and fantasies to operate *outside the constraints of reality* ("I want to marry my sister-in-law"); it tolerates *conflicts and ambivalences* ("I hate the person I love"); and it abandons the rules of logic in favor of disguise through *word play, condensation of meaning, symbolization*, and *displacement* (dreams, jokes, symptoms). Poetry and abstract art can come close to representing unconscious mental thought, what Freud called "primary process." Romance itself falls in with the loosened logic, magical thinking, and dreaminess of unconscious life. Yet to call primary process phenomena "irrational" is misleading, for the images and connections make perfect sense when subjected to reasoned investigation. An individual fails to finish her book out of an unconscious desire not to exceed her mother's own unconsummated ambitions; another sabotages love relationships out of fear of being abandoned as he was by his father in childhood; yet another experiences guilt for an act she did not commit as penance for her unconscious wishes to harm a love rival. Even what appear to be clear disruptions or breakdowns in meaning—silence, compulsive repetitions, or recurrent nightmares—can often be traced back to some earlier experience, perhaps a trauma that at the time overcame the mind's capacity to process feelings in a logical, cognitive way. In these cases, the breakdown of thought might itself be the memory of the earlier traumatic experience.

Let us take a common example of primary process thinking at work. A patient comes to treatment because of failures in love. Every time a relationship develops to the point of commitment, she breaks things off, only to be overcome with regret once it becomes obvious that there is no longer hope for reconciliation. She may in fact try to break things off with the therapist, which psychoanalysts would call an "acting out" of the transference. If the patient manages to stay in the therapy, the irrationality of her underlying thinking emerges: "I must rid myself of the person I love." Analytic work might uncover an early pattern of parental withdrawal, or excessively self-critical standards being projected onto others, or the anticipation of abandonment rooted in childhood experience. The meaning of the self-destructive pattern is not irrational from this perspective; to the contrary, it is likely *overdetermined*, that is, carrying more than one meaning. The irrational thought "I must rid myself of the person I love" might be a complex expression of

memory, love, desire, and aggression. What appears to be an irrational pattern —so consciously perplexing—will make perfect sense once located in the patient's inner psychic world.

The conflict thesis thus fares no better with its critique of irrationality than it did with the critique of determinism. From a psychoanalytic perspective, irrationality resides only in the *gap* between unconscious and conscious. We experience our thoughts, feelings, and desires as irrational only because we do not know their unconscious sources. Our irrational symptoms are "compromise formations"— both an expression of unconscious thought and our way of defending against knowing that thought—located at the intersection of the conscious and unconscious parts of our psyche. While the unconscious may violate the logical rules of conscious thinking, it nevertheless has meaning accessible to reasoned, self-reflective inquiry. When brought to the light of day, our unconscious life makes perfect sense: there is method in our madness. Thus it is not true that the unconscious is wholly irrational, and so it is not true that psychoanalysis presents a picture of the unconscious mind incompatible with the law's ideal of free will.

Opacity

A third, and related, basis for asserting the incompatibility of law and psychoanalysis is the mind's opacity: although unconscious thoughts, feelings, and wishes are part of our minds, we cannot know them in any meaningful or useful sense. If one needs years of analysis on the couch to get at unconscious meaning, then, as a practical matter, the psychoanalytic view of the unconscious really is irreconcilable with law's presumption of free will, in other words, the presumption that there is a relatively direct and transparent connection between a person's intentions and his actions. If we do not have access to our unconscious thoughts, feelings, and desires, if we cannot readily understand what moves us to behave in seemingly irrational ways, then for all intents and purposes we are nothing more than puppets on the strings of our unconscious minds. This point carries greater weight than the concerns regarding determinism and irrationality because opacity really *is* an attribute of the psychoanalytic unconscious, although not to the extent critics of psychoanalysis believe.

What does opacity of mind mean in a psychoanalytic sense? By definition, of course, what is unconscious exists outside our immediate awareness. Much of our unconscious thinking helps us to navigate everyday life. A division of labor allows unconscious minds quickly and effortlessly to process sense perceptions, to direct physical mobility, and to carry out intuitive decision-making, which frees up our conscious mind for other tasks.[38] To take a common example, when we are learning to drive a car we are conscious of every decision, but once we are experienced drivers, thinking happens at an unconscious level unless some event draws our attention, such as the sudden appearance of a warning light. At that point, our unconscious thought processes become conscious. We are able to make the transition from unconscious to conscious simply by turning our attention to the previously unconscious matters. Most people use the term "unconscious" to refer to these thought processes that are outside awareness but easily available to conscious thinking. Cognitive psychologists refer to this type of thinking, not surprisingly, as the "cognitive unconscious."[39] Freud called it the "preconscious." The cognitive unconscious or preconscious poses no challenge to free will because its contents can be brought into conscious awareness with an attentive gaze.

Psychoanalysts, however, work with the concept of the "dynamic unconscious." The dynamic unconscious refers to thoughts, feelings, and desires that not only are outside awareness but are brought to conscious awareness only with great effort. Unconscious thoughts are outside awareness for reasons beyond a mere practical division of labor that we see with driving a car. Mere attention will not unveil the contents of the dynamic unconscious. These thoughts, feelings, and desires remain opaque to view for a variety of reasons. Some unconscious thinking goes back to a preverbal period, rendering it difficult to transform these trace memories of impressions, feelings, and images into conscious verbal form. Other unconscious ideas conflict with our conscious sense of ourselves or cause us pain or anxiety, in which case we resist becoming aware of the offending thoughts. For example, a person might think of herself as a giving person but harbor unconscious fantasies of selfishly fulfilling her own needs. Or an individual might consider herself committed to racial equality while unconsciously harboring biased

beliefs.[40] Another might resist knowing the truth about the lipstick stain because she cannot bear the idea of her husband's infidelity. Even when someone draws our attention to the unconscious thought—the equivalent of the warning light in the car—we resist seeing it.

Resistance is thus motivated by a desire not to know those parts of ourselves that conflict with our conscious sense of who we are, or otherwise cause us pain or anxiety. Both the ideas and the resistance against the ideas remain unconscious. Without resistance, it would be easy enough to become aware of the unconscious thoughts; we would simply reflect on ourselves and know. We thus confront the psychoanalytic version of *willful blindness*, that is, the mind's motivated resistance to the truth of unconscious thoughts, feelings, or desires. Resistance—our willful blindness to the unconscious—poses the most serious challenge to law's presumption of free will.

But resistance can be overcome. Psychoanalytic treatment proceeds on the basis that individuals can, with effort, come to know their own minds. We pierce the opacity of mind through reasoned self-examination. Of course, the examined life is not an easy one, and what the examination reveals is not easy to confront once known. Freud himself wrote about the "interminable" character of the psychoanalytic process.[41] Overcoming unconscious resistances to self-knowledge is difficult even under the best of circumstances. Yet despite obstacles, psychoanalysis does not insist on the impossibility of self-knowledge outside of its own treatment processes. The assumption that self-insight is "beyond the powers of the average person" is simply wrong.[42] While deep self-knowledge is always difficult to achieve, the capacity for meaningful self-insight nevertheless lies within reach for the vast majority of people.

By drawing our attention to the dynamic unconscious, therefore, psychoanalysis shows us that our capacity for agency turns on our ability to think about ourselves, in other words, to engage in reasoned self-inquiry. We have it within our abilities to achieve what we can call, in psychoanalytic terms, *good-enough* self-insight, that is, a level of self-knowledge that we associate with the capacity to make choices about how to live our lives. Psychoanalysis is the paradigm model of secular self-inquiry, but the treatment of five

days a week on the couch should not be the only paradigm. Less intensive therapies also utilize psychoanalytic methods of interpretation. And no psychoanalyst would contend that psychoanalytic therapy is the only avenue for productive self-reflection. Intimate relationships of many kinds can prompt self-inquiry and lead to self-knowledge, including relationships with spouses, partners, friends, religious counselors, and teachers. We commonly come to understand ourselves in relationship to others: not through solitary silence, but through talk; not as isolated atomistic selves, but as fundamentally constituted in relationship to others. We learn about ourselves as we struggle to understand our feelings for and reactions to others. The pathways to self-knowledge are endless in a culture that supports and values the examined life.

Psychoanalysis thus shows us that we are blind to our own unconscious lives at the same time that it models a process of self-understanding. Deep self-reflection can precipitate resistance, but it also holds out the possibility of bringing cohesion and meaning to the puzzling aspects of our experience. The process of self-reflection is hardly easy or benign: it involves questioning one's conscious beliefs, casting off long-held assumptions, and pushing past psychological resistances. And it takes time. Self-insight of any substantial depth is not acquired in hours or days.

Psychoanalysis does not insist on a particular vision of the good life, but it does have certain foundational norms, including the moral imperative to take account of one's internal world. The hurdles to self-understanding do not change the fact that psychoanalysis, like law, sets human freedom as an achievable goal. Psychoanalysis supports a notion of free will—however constrained—premised on the idea that individuals have the capacity to know their own minds. We may resist knowing, we may not want to know, we may be motivated to remain ignorant of our own intentions, but we are obligated to engage in self-inquiry. Our decision not to look inward—our *willful blindness* to our own unconscious minds—is a moral failure, in psychoanalytic terms. We are responsible precisely because we have the capacity, albeit limited, to know and control our unconscious selves.

A psychoanalytic imperative of self-examination thus reconciles the reality of unconscious life with law's notion of free will. Given the possibility for

self-insight through self-reflection, the mind's opacity wields no fatal blow to the idea of free will. The true threat to living as an agent of one's own life is not the unconscious, but the lack of understanding. And *that*, from a psychoanalytic perspective, can be overcome. As we will now see, the implications for legal responsibility are profound.

Law's Examined Life

Thus we come to learn that the psychoanalytic unconscious is not strongly deterministic, irrational, or fully opaque to understanding, and therefore is not incompatible with law's operating presumption of free will. It is true that psychoanalytic insights into the unconscious, resistance, and self-inquiry show us that individual choice is, in fact, considerably more constrained than law generally admits. But however constrained, a psychoanalytic view of the psyche establishes agency alongside unconscious forces as the cornerstones of individual selfhood. The pressing question is what law should do when faced with a psychoanalytic reality where agency—in the sense of unimpeded conscious decision-making about the course of action to pursue—exists only in the most rarified circumstances of guided self-inquiry. Most of the time, if not perhaps all of the time, we operate with only partial knowledge of our true motives and desires. But appreciation for the narrow range within which human agency operates does not exclude reliance upon a fictional presumption of free will to establish legal liability in some cases. In psychoanalysis, as in law, intent or knowledge must sometimes be presumed.

Indeed, psychoanalysis itself relies on its own presumption of free will at certain times. In discussing the question of moral responsibility for unconsciously motivated acts, the legal philosopher Michael Moore discusses Freud's views on our responsibility for dreams, parapraxes (slips of the tongue; missed appointments), and symptoms.[43] He usefully gives us Freud's story of the missed appointment:

> A lover who has failed to keep a rendezvous will find it useless to make excuses for himself by telling the lady that unfortunately he completely forgot about it. She will not fail to reply: "A year ago

> you wouldn't have forgotten. You evidently don't care for me any longer." Even if he should seize on the psychological explanation mentioned above and try to excuse his forgetfulness by pleading pressure of business, the only outcome would be that the lady, who will have become as sharp-sighted as a doctor in psychoanalysis, would reply: "How curious that business distractions like these never turned up in the past!" The lady is not of course wanting to deny the possibility of forgetting; it is only that she believes, not without reason, that practically the same inference—of there being some reluctance present—can be drawn from unintentional forgetting as from conscious evasion.[44]

Freud, Moore reasons, suggests that the keen-sighted woman "rightly holds her lover responsible for missing the appointment."[45] Moreover, patients are presumed to be freely willing decision-makers at the moment they make the decision to enter treatment or to begin medication, whatever the impaired state of their minds.[46] Patients are understood to have the autonomy to end treatment at any time, despite the deep dependence and attachment of the transference relationship. The presumption of free will in psychoanalysis is a concession to the need for the treatment to rest on patient consent. Moreover, analysts hold their patients accountable for their actions, however unconsciously driven: bills must be paid, physical threats will not be tolerated, sessions must be attended. In these ways, psychoanalysis does not differ from the law. Pragmatic demands—time pressures, the need for predictability and certainty, the difficulties of knowing—sometimes dictate going forward "as if" individuals have free will in both of these practical disciplines. Fictions operate in psychoanalysis as much as—perhaps even more than, given its emphasis on fantasy life—in law.

Yet there is a subtle but essential distinction between presuming free will because people are conscious, intending actors, as law does now, and positing free will with full and open recognition that people have powerful unconscious lives, as psychoanalysis would have it. Properly understood, a psychoanalytic perspective on human agency brings law closer to its ideals of fairness and justice in three important ways.

First, a psychoanalytic jurisprudence that recognizes the role of unconscious factors in our lives warrants greater skepticism about adjudicating mental states, greater humility in judging, and greater compassion for wrongdoers. Psychoanalysis forces us to confront the inescapable fact that we cannot know with certainty what a criminal defendant actually thought or intended when he committed his crime. The criminal law's recognition of the ways in which unconscious factors limit free will—and hence moral responsibility—should make the system less harshly retributive and more rehabilitative in its aims. A psychoanalytic perspective does not absolve an individual of guilt in all cases in which unconscious motives operate, for obvious reasons. We posit free will in part because we recognize the adjudicatory limitations on establishing state of mind. We cannot inquire every time an individual runs a red light whether he unconsciously harbored a death wish. Nor, as even Freud told us, can we put defendants on the couch to uncover their hidden intentions.[47] But a psychoanalytic perspective does compel a greater sense of humility around criminal judging, somewhat greater leniency in sentencing, and stronger rehabilitative aims. Psychoanalysis also raises the possibility of new forms of criminal liability, such as partial responsibility.[48] If we are sentencing individuals to prison when we are unsure about their moral responsibility—Did the person really choose to pull the trigger?—then the system as a whole must soften its epistemological certainty and harsh retributive goals.

Which brings us back to Heredia and the accusation that she was willfully blind to the drugs in the trunk of the car. If psychoanalysis tells us that individuals enjoy only some degree of free will, what does this mean for individuals like Heredia, who certainly had no opportunity for deep self-reflection at the moment she got in the car to drive back to the United States? Or for those who, even with the time and leisure to look inward, nevertheless fail to do so? In any particular case, an individual may not, indeed, know her unconscious mind. Time may be too short; circumstances may be too chaotic or traumatic; resistances may be too strong. But as explained, psychoanalysis does not rule out holding individuals legally responsible in circumstances where we can say that there was a real likelihood that psychic factors beyond their control limited their awareness of what they were do-

ing. Even the most well-analyzed individual operates much of the time in the dark, looking for answers only after the fact: "Oh, this is why I failed to question my mother about the strange odor emanating from the trunk of the car." But psychoanalysis does counsel leniency in the face of these psychological concerns. To treat Heredia the same as any other drug runner would be to willfully ignore the high likelihood that factors beyond her control—unconscious fears of retaliation or abandonment by loved ones—drove her to overlook the crime taking place. Overall, a psychoanalytic perspective supports a criminal justice system more modest in its certainty, more tentative in its judgment, and more compassionate in its punishment.

Second, a psychoanalytic jurisprudence furthers the goals of our legal system by promoting a culture of critical self-inquiry more broadly. The capacity to self-reflect must be developed and nurtured. In a concrete way, the judicial system can foster self-inquiry through its plea-bargaining processes, its rehabilitative programs in prisons, its child welfare system, its family mediation programs, its civil-case settlement programs, its prison treatment policies, and all other arenas where the law has the opportunity to move individuals affirmatively toward developing the capacities of, and motivations for, self-reflection and self-understanding. This is not a trivial point in light of the vast numbers of cases that are resolved short of formal adjudication in alternative dispute processes during which reflection upon one's deeds and decisions is more likely to take place. A legal system that creates processes by which those judged liable can reflect upon their actions, understand their root causes, and accept moral responsibility for what was done may properly be called rehabilitative and just, even merciful.

Finally, a psychoanalytic perspective on free will helps us to evaluate particular doctrinal areas where the presumption of free will in law should be significantly modified or eliminated altogether. The remainder of this book addresses this theme. We will examine areas of law in which psychoanalysis suggests that law's governing assumptions about personal agency should be questioned, softened, or abandoned. These laws are many and varied, but our focus in this book will be on the core areas of family relations and criminal wrongdoing. Some innocent individuals accused of crimes may be overcome with unconscious guilt for prior bad acts. Women entering into

gestational surrogacy contracts may be motivated by unconscious needs for caregiving themselves. Persons threatening violence may be unaware of the clear meaning of their words or unaware of the unconscious aggression. Patients in therapy may consent to sex while under the sway of powerful unconscious desires. In all these cases and more, individuals confront powerful unconscious forces not easily brought to light. Psychoanalysis gives us the tools for reshaping the legal framework in these and other areas to take account of these unconscious dynamics.

A psychoanalytic perspective on the law helps move us in the direction of a jurisprudence that accommodates the law's need for personal accountability with the reality of the unconscious. In doing so, psychoanalysis offers the law meaningful insights into what it means for individuals to exercise some degree of agency given the demands of unconscious life. Obviously, psychoanalysis exposes limits on the individual's capacity for free choice. The fact that much about mental life is opaque to critical inquiry, that individuals keep memories and ideas out of consciousness, and that self-destructive urges are universal all combine to paint a fairly negative picture of the individual psyche. Yet psychoanalysis also exhibits a long-standing optimism about the possibilities for self-reflection and self-transformation. Psychoanalysis thus contributes to a radical destabilization of the conscious, knowing self at the same time that it recognizes and valorizes the individual's abilities for agency, insight, and choice through reasoned self-reflection. In alliance with law, psychoanalysis is a pragmatic endeavor designed to balance our vulnerability to unconscious forces against our capacity, as agents of our own destiny, to rise above them.

PART TWO

Applications

FOUR

Guilty Minds

A criminal confession is a prosecutor's dream. As the Supreme Court tells us, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."[1] Jurors usually give confessions more weight than any other type of evidence.[2] For some types of crimes, like murder, a confession is the main route to a conviction.[3] But confessions present an obvious conundrum: Why would any sane and rational person voluntarily confess to a crime, knowing full well that the state will punish in return?[4] We easily understand why an individual might willingly confess to God, to his loved ones, even to his therapist. Similarly, we readily comprehend why he might confess to the victims of his criminal acts or their families. Confession in the context of these relationships may repair the offender's relationship to others, absolve the offender of guilt, or return the offender to his prior status in the community. Outside of the law, confession repairs and restores. But how do we understand the forces that lead someone to confess knowing full well that his confessor will punish with little, if any, mercy?

Psychoanalysis gives us a framework for understanding the motive to confess to the punishing authority of the state. Of course, not all criminal confessions require deep-seated explanations. Some suspects might wish to protect an accomplice. Some young, gullible, or mentally impaired suspects may confess out of confusion or an unenforceable promise of leniency or simply a desire to go home. Suspects without money to post bond may confess to get out of jail, even temporarily. Others may fear for their physical safety. But in some cases suspects confess where no such clear utilitarian explanation exists. The compulsion to confess can transcend circumstances. As Chief Justice Burger once stated, borrowing from the psychoanalyst

Theodor Reik, "[t]he human urge to confess wrongdoing is . . . normal in all save hardened, professional criminals."[5] Freud too famously observed that most people cannot keep themselves from confessing their secrets: "He that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his fingertips; betrayal oozes out of him at every pore."[6] A guilty mind, nothing more, may often be the best explanation for a suspect's decision to confess.

The current law of confessions recognizes a guilty mind as a motivating factor in the confessional process. The Supreme Court accepts harsh interrogation practices in part because confession can be said to unburden the accused's sense of guilt. Confession allows the accused to "make a clean breast of things" in the interrogation room.[7] In this regard, confession serves everyone's interests: the interest of law enforcement in catching a criminal, the interest of society in maintaining social order, and the interest of the accused in personal redemption by relieving his guilty conscience. And confession to some extent always engages deep-seated unconscious desires for absolution and atonement, desires long expressed in religious and, later, psychoanalytic confessional models.[8] Yet as we will see, unconscious guilt can be exploited by interrogators in ways that undermine the voluntariness and reliability of any ensuing confession.

In our constitutional system, criminal confessions must be voluntary. The Due Process Clause and the Fifth Amendment both ensure that law enforcement do not force confessions from the lips of an accused.[9] The Due Process Clause prohibits confessions that are obtained through methods that override the accused's powers to resist. "The determination 'depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.'"[10] This "totality of the circumstances" test has largely been replaced by the Fifth Amendment's requirement that police give *Miranda* warnings to suspects in custody.[11] As long as interrogators read a suspect his *Miranda* rights, courts will generally treat any ensuing confession as the product of a free and voluntary choice. In the Supreme Court's words, the warnings ensure that the suspect's will has not been "overborne" and his capacity for self-determination remains intact.[12] The law of confessions thus offers yet another example of the presumption of

free will at work. "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."[13] Once the *Miranda* warnings are given, statements by the accused are presumed to be both voluntary and true.

Psychoanalysis opens the door to a fuller understanding of the place of psychological coercion in criminal interrogations.[14] As detailed in this chapter, certain interrogation tactics raise serious questions going to the unconscious dynamics of the interrogation situation. We cannot know for sure in any particular case why an accused has confessed. But psychoanalysis reveals the ways in which certain deceptive and degrading police interrogation tactics shatter law's pretense of a freely confessing subject. We will consider three interrogation techniques of greatest concern from a psychoanalytic perspective: false sympathy, degradation, and trickery.[15]

We may take it for granted that interrogation tactics aimed at exploiting a guilty conscience are fair game for police interrogators. Unlike the rack and the thumbscrew, such interrogations are, we presume, consistent with the Constitution's prohibition on involuntary or compelled self-incrimination. Yet as we will see, false sympathy and degradation exploit deep-seated, unconscious desires for absolution and punishment that undermine the voluntariness of a suspect's self-incriminating statements, whether those statements are true or false. Similarly, police trickery can take unfair advantage of a suspect's need to rationalize unconscious guilt for a crime he did not commit. All these tactics work by enlisting unconscious currents of love and aggression that override an individual's conscious decision-making powers. Given the concerns about voluntariness and reliability that these interrogation tactics raise, *Miranda* should not be the final word on the admissibility of confessions. The interrogation practices discussed here should be subjected to close judicial scrutiny under the Due Process Clause as well.

Psychoanalysis is not only a model of the mind relevant to understanding why people confess; it is also a confessional practice in its own right. Freud learned early on that patients strenuously resist confessing the truth, but he also came to understand that coercive tactics do not effectively overcome that resistance. He abandoned the coercive techniques of suggestion and hypnosis

in favor of free association, a method requiring the patient to say anything that comes to mind, uncensored. Psychoanalysis recognizes the core paradox that patients both desire to confess and resist doing so at every turn, as well as other contradictions inherent in the confessional process: that confessions (and the guilt that fuels them) may be true to psychic experience but false in fact; that the relationship between confessor and confessant may engage both loving and aggressive feelings; and that an individual may confess both to absolve himself of guilt and to be punished. Can law accept the psychoanalytic paradoxes surrounding guilt and confession without unseating fundamental ideas of free will and voluntary choice that are the foundation of our criminal justice system?

False Sympathy and Degradation

The most famous case involving interrogation practices aimed at arousing guilt for a crime is *Brewer v. Williams*.[16] An escapee from a psychiatric hospital, Robert Williams, was convicted of murdering ten-year-old Pamela Powers after abducting her from a YMCA in Des Moines, Iowa, where she and her family were attending her brother's wrestling match. Williams surrendered himself to the police in the town of Davenport, about 160 miles from Des Moines, where he was then arrested and advised of his *Miranda* rights. Two Des Moines police detectives picked Williams up and drove him back to Des Moines. During that long drive, Detective Leaming engaged in a wide-ranging conversation with Williams. Leaming knew that Williams was a former psychiatric patient and deeply religious.

In the course of their conversation, Leaming delivered what is known as the "Christian Burial Speech":

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where

> this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.[17]

Soon after, Williams directed the detectives to the body of the girl. At his subsequent trial for murder, Williams argued that Leaming's speech coerced him into confessing in violation of the Due Process Clause. The Court did not reach the question of the voluntariness of the confession, holding instead that the state had failed to meet its burden of showing that Williams had knowingly waived his Sixth Amendment right to counsel. Williams was retried and convicted of first-degree murder.[18]

Leaming's Christian Burial Speech is a classic example of the use of guilt-inducing tactics in police interrogation. In the Supreme Court's words, the interrogators in the case hoped to "prick the conscience" of the accused, Robert Williams.[19] At first blush, there might seem to be nothing particularly objectionable about Detective Leaming's guilt tactics. Had the Supreme Court decided the issue, it would likely have ruled that Williams's confession was voluntarily given. As Justice White argued in dissent, "[m]en usually intend to do what they do, and there is nothing in the record to support the proposition that [Williams's] decision to talk was anything but an exercise of his own free will."[20] Unlike the rack and the lash, the appeal to conscience seems designed to persuade the accused rather than break him. It aims to induce the accused into confessing by stimulating a desire to "come clean."[21] Appeals to the accused's sense of guilt do not appear to "wring a confession out of an accused against his will" in the same way as questioning in the third degree.[22] Under questioning designed to arouse guilt, the suspect remains a freely choosing, autonomous decision-maker. Law's presumption of free will stays decidedly intact.

But should it? Psychoanalysis pushes us to inquire more deeply into how certain guilt-inducing interrogation tactics go beyond ordinary acceptable methods of police pressure by creating a particular kind of confessor-confessant relationship undermining of free choice. Two guilt-inducing practices in particular deserve our attention: police tactics that use false sympathy for the accused in order to develop a feigned relationship of trust and honesty, and police tactics that amplify a suspect's unconscious self-destructive urges by creating a relationship with sadomasochistic overtones. These interrogation practices may prompt the accused to seek, respectively, absolution from a falsely benevolent confessor or punishment from a truly dominating confessor, or both.[23] Interrogation tactics fuel both the love for the other and the hatred for the self that define the affective core of these two paradigmatic confessional relationships.

False Sympathy. As the facts in *Brewer v. Williams* exemplify, police interrogators often seek to cultivate a false bond of trust and affection with the accused.[24] Through a false alliance, the interrogators hope to stimulate the accused's desire to cooperate with and even please his interrogators. The interrogators "attempt to portray the questioning as a friendly joint problem solving exercise and to convey that they are fundamentally concerned about the suspect's welfare."[25] But interrogation tactics that use false sympathy to obtain a confession obscure the indisputably adversarial nature of the encounter. The interrogators deceive the accused into believing that they have the accused's best interests in mind when in fact nothing could be further from the truth. A relationship based on false sympathy thus runs the risk of conscripting the accused unconsciously into seeking absolution from his benevolent confessors for his guilty acts.

The Supreme Court specifically designed the *Miranda* warnings with a concern about false sympathy in mind. "The warning that anything said can and will be used against the individual in court . . . may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest."[26] The Court openly acknowledged that interrogation environments are created "for no purpose other than to subjugate the individual to the will of his examiner."[27] Indeed, "[t]he entire thrust of police interrogation . . . [is]

to put the defendant in such an emotional state as to impair his capacity for rational judgment."[28] The Court emphasized that "the process of in-custody interrogation contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[29] At the time it was decided, the *Miranda* decision aimed to dispel the fiction that police interrogators were truly sympathetic to the plight of the accused by awakening the suspect to the reality of the situation and his right to call a halt to the interrogation.

We might be tempted to presume that any reasonable person brought into custody and read her *Miranda* rights should be aware that she is not in the presence of friends. From this perspective, reading an accused her *Miranda* rights firmly establishes the adversarial frame for the encounter no matter what expressions of compassion or friendship may follow. A reasonable person read her *Miranda* rights, the Court suggests, should have no difficulty resisting the charms and seductions of her police interrogators. As already noted, the Supreme Court has confirmed that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."[30] In the years since *Miranda* was decided, the Supreme Court has backed away from its emphasis on the inherently coercive nature of custodial interrogation and instead erected *Miranda* as a shield against claims of coercion. Since *Miranda*, the Due Process Clause's prohibition on involuntary confessions has largely dropped from view.

Psychoanalysis helps us to see how false sympathy violates the constitutional injunction against involuntary confessions. From a psychoanalytic perspective, voluntariness can be compromised even after the warnings have been given. Confession always takes place in the context of a relationship: with God, with one's priest, with one's analyst, and with police interrogators. When interrogators deploy false sympathy, they change the terms of the relationship between interrogator and accused. The technique is aimed at cultivating a feigned benevolent relationship between the suspect and his police interrogators. In psychoanalytic terms, we would say that police interrogators use false sympathy to foster a "transference" relationship

with the accused, one that amplifies the accused's childlike dependency upon his accusers and his need for their approval. The relationship between confessor and confessant "contains, and activates, elements of dependency, subjugation, fear, the desire for propitiation, the wish to appease and to please."[31] Isolation, fatigue, and fear may heighten the regressive feelings of dependency on the interrogators. The accused may be swept up into a transference storm of emotions that drives him to comply with his quasi-parental interrogators. From a psychoanalytic perspective, false sympathy deploys the transference—the childlike yearnings for approval—to lure the accused into seeking absolution for his sins. The phenomenon of transference explains how some accused will be coerced into confessing to police interrogators even after they have been told that any confession will be used against them.

Courts are not blind to transference and its implications for voluntariness. Interrogation-based transference resembles the kind of transference seen in therapy and other contexts in which individuals experience childlike dependence upon an authority figure. In these other confessional relationships, courts recognize that intense transference feelings undermine consent. As discussed in chapter 7, law restricts sexual choices in the context of the therapist-patient relationship expressly because the transference dynamics between the two parties throw into question any purported "consent" on the part of the patient. Many states ban sexual relationships between clergy and penitents and between family lawyers and their clients for the same reason. Yet despite attention to transference in the sexual realm, law remains doggedly blind to the fact that strong transference feelings similarly operate in the interrogation room. False sympathy does not cultivate an explicitly erotic transference, as it does in therapy or other professional relationships, but rather emotionally charged longings for parental love and approval. The desire is for absolution rather than sex.

When interrogators set out to cultivate a transference relationship that ensnares the accused, their tactics raise serious questions about the voluntariness of any ensuing confession. Police interrogation that pretends to offer spiritual solace or moral redemption can ignite unconscious transference processes that override rational thinking. It is possible, of course, that false

sympathy may lead an accused to deliberate carefully about his options rather than drive him to confess. But from a psychoanalytic perspective, conscious consideration of one's needs for absolution from a more powerful confessor under these circumstances is not likely. In his Christian Burial Speech, Detective Leaming used false sympathy to deepen Williams's guilt over his role in depriving the parents of a Christian burial for their daughter. By assuming the guise of a benevolent confessor, Leaming was able to enlist Williams, a deeply religious man, in the very process designed to prosecute and convict him. Expressions of false sympathy for the accused risk igniting unconscious needs for acceptance and forgiveness that may override an individual's capacity to realistically assess whether to talk to the police.

False sympathy almost always plays on guilt. Detective Leaming expressed his desire to help Williams ease his conscience, thus misleading him into thinking that confessing—making a clean breast of things—would be in his best interests. Minimization tactics—"by which interrogators normalize and suggest moral justification for the crime"—comprise another common form of false sympathy.[32] In *Miller v. Fenton*, the detective's false reassurance that the suspect was "not responsible" appeared to prompt the confession. The following exchange took place. Detective Boyce: "I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?" Frank: "I feel bad."[33] And in *Miranda* itself the Supreme Court offers the following example of an interrogator's supplication: "Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good."[34] When police follow this line of questioning, essentially asserting: "[m]orally, you are not to be condemned" or "[c]learly you were acting in self-defense," the interrogators mislead the suspect into believing their falsely benevolent intentions.[35]

Police interrogation practices that use false sympathy do not break the accused's will in the same way as the rack and the thumbscrew, but the psychological coercion inherent in these practices can be both overpowering and concealed. As Justice Frankfurter observed in the 1961 case *Culombe v. Connecticut*: "[T]he risk is great that the police will accomplish behind

their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices."[36] In the realm of criminal law, the confessors are not God or loved ones or even the victims, but accusers bent on punishing rather than forgiving. Absolution in other arenas—Catholic confession or psychoanalytic therapy—may bring spiritual or psychological solace. But once a confession is obtained, criminal interrogation quickly reveals its punitive aims and the transference spell is broken.

Psychoanalysis does not require that every expression of friendliness be prohibited. Far from it. But it does raise serious concerns about expressions of false sympathy that go too far in stimulating transference distortions in the interrogation relationship. Good-cop, bad-cop routines heighten the risk of coercion by enhancing the benign, protective, quasi-parental role of the "good" interrogator. Under the Due Process Clause's voluntariness standard, courts should look carefully at whether the interrogators' efforts to create a relationship built upon expressions of sympathy and support have overridden the accused's powers of resistance. This due process inquiry does not require putting the parties on the couch to explore the subjective terrain of their relationship. Bright lines of behavior can be established to identify when the police cross the line between valid interrogation practices and unconstitutional tactics of false sympathy. Psychoanalysis thus brings the Due Process Clause back into play, supplementing *Miranda*'s Fifth Amendment protections as a vital guarantor of criminal defendants' rights.

Degradation. An accused may not always be taken in by false sympathy. Instead, he may remain fully aware that confession to police brings punishment. Indeed, punishment may be the point. Psychoanalysis teaches us to look for signs that interrogators have developed, not a falsely benevolent relationship with the accused, but one imbued with sadomasochistic impulses and desires. Police practices that trade in degradation run the risk of overriding an accused's powers of reason by activating unconscious self-destructive urges.[37] As we have seen, the due process inquiry turns on "a weighing of the circumstances of pressure against the power of resistance of the person con-

fessing."[38] Degrading tactics override the suspect's powers of resistance by mobilizing unconscious desires to suffer in atoning for an inner sense of guilt, throwing the voluntariness of the confession into question.

Guilt that precipitates a desire for punishment may be conscious or unconscious. An accused may feel consciously guilty for a crime he in fact committed. But innocent people can feel guilty, too. They may consciously know they did no wrong but feel like criminals nevertheless. And as psychoanalysis helps us to see, all of us suffer to some degree from unconscious guilt. Freud believed that unconscious guilt results from a successful resolution of the Oedipus complex, which involves the subordination of powerful incestuous longings and murderous envy to parental authority. For Freud, the internalized parental code against incest and murder consolidates into the morally exigent superego.[39] Constituted by these internalized parental prohibitions, the superego is the source of our self-critical feelings. "[T]he external restraint is internalized and the superego takes the place of the parental agency and observes, directs and threatens the ego in exactly the same way as earlier the parents did with the child."[40] The Freudian superego's self-punitive features are fueled by guilt stemming from the psychic residue of early childhood aggression toward parental figures. Guilt over the original psychic "crimes" against the parents can be animated, amplified, and redirected by subsequent wrongdoings, whether they be fantasized or real, a desire to kill or an actual rageful encounter, a fantasy of murder or the crime itself.

Psychoanalysts since Freud have drawn attention to the loving as well as the aggressive elements of the superego.[41] In this regard, object relations theorists have shifted their attention from the Oedipal period of conflict within the family triad to pre-Oedipal attachment feelings within the dyadic caregiver-child relationship. Melanie Klein's work on the pre-Oedipal dynamics of love and guilt in the infant's psychic life broke with Freud by locating the origins of guilt in the early relationship to a caregiving figure.[42] In Klein's work, the development of guilt feelings begins before the triadic drama of the Oedipal period, during an earlier period of infant care when the child struggles with "good" and "bad" fantasies of the caregiver. Learning to integrate opposing feelings for the primary love object is a necessary developmental task leading to the attainment of a more mature integrated

state of mind and orientation toward other people. Klein views guilt as a sign of an infant's developing capacity for integration, what she calls achieving the "depressive position," a state in which the child finally attains a fuller, more integrated picture of the caregiver.[43] Yet for Klein, "the establishment of the depressive position brings with it a number of fundamental changes to mental life, including . . . the capacity for guilt and concern."[44] While some actual oral aggression toward the primary caregiver takes place, it is the overpowering fantasy of destroying the loving object that animates the unconscious guilt of the depressive position.[45] Once achieving a more mature, integrated state, the child must now contend with guilt resulting from the knowledge that destructive fury was directed toward a benevolent caregiver.[46]

The psychoanalyst Hans Loewald ties unconscious guilt to the emergence of a sense of an autonomous self. He views the child's Oedipal rage toward the parents as the stimulus for the child becoming an independent individual freed from parental control. "[I]t is no exaggeration to say that the assumption of responsibility for one's own life and its conduct is in psychic reality tantamount to the murder of one's parents, to the crime of parricide, and involves dealing with the guilt incurred thereby."[47] For Loewald, the Freudian parricidal wishes constitute the founding moment of autonomous selfhood; unconscious guilt necessarily follows from an individual's murderous assumption of control over his or her own life. Loewald's theory of unconscious guilt focuses our attention on the close psychic connection between free choice and guilty submission: between the freely choosing autonomous individual voluntarily confessing his sins and the abject, guilt-ridden subject driven to confess his crimes. In Loewald's theory, there is no broad chasm separating these two states of self.

The structure of psychic life—the superego demands, the depressive ambivalence, the autonomy strivings—rests upon a foundation of unconscious guilt that stays with an individual, with varying degrees of intensity, throughout life. We express unconscious guilt in our everyday lives when we engage in self-criticism, self-denial, and masochistic thoughts and behaviors. When we say someone suffers from a harsh superego, we mean that he or she engages in excessive forms of self-criticism and self-chastisement for usually

exaggerated or even imagined wrongs.[48] A guilty conscience manifests itself in "a self-reproaching attitude, a self-accusatory one, a self-attacking one."[49] In his paper on masochism, Freud described "the satisfaction of this unconscious sense of guilt as perhaps the most powerful bastion in the subjects' . . . gain from illness."[50] The degree of self-reproach corresponds to the internal sense of wrongdoing rather than to any external reality.

Unconscious guilt can thus fuel the desire for self-punishment. An individual may unconsciously look for ways to confirm the belief that he has violated some fundamental moral norm. The fantasy of punishment may thus predate an actual crime. Freud referred to "criminals from a sense of guilt" in describing individuals who go so far as to commit criminal acts in order to obtain the satisfaction of punishment for some earlier crime—real or imagined.[51] At least one federal appellate court has reversed a criminal conviction on this ground, holding that the defendant acted from "an unconscious desire to be apprehended and punished."[52] For purposes of atonement, the present-day offense makes almost no difference. One might plan carefully or avail oneself of circumstances. "In such instances, one form of suffering has been replaced by another, and we see that all that mattered was that it should be possible to maintain a certain amount of suffering."[53] Self-reproach never works to expiate the guilt. "It is hoped that punishment will extinguish guilt, but it does not work for any length of time and more punishment is needed."[54]

Freud wrote regularly on the topic of masochism.[55] In his work on beating fantasies, for example, Freud described masochism as providing both punishment for forbidden wishes and, simultaneously, libidinal gratification.[56] In "The Economic Problem of Masochism," Freud argued that the need for punishment becomes sexualized, thus turning superego retribution into an instinctual satisfaction.[57] Later analysts have emphasized that masochism often has roots in early abuse, identifying "the interpersonal, attachment, and (predominantly preoedipal) object relations aspects of masochism," and locating the origins of masochism in "the need to preserve a tie to an object at whose hands one has suffered in childhood."[58] In this view, the adult love of suffering has its roots in the child's adaptive response to an abnormal environment.[59] Freud also related masochism to trauma. He described the human need to master a psychic trauma, a process that leads individuals to

return to the traumatic event in thoughts, dreams, or repetitive actions.[60] The repetition compulsion, as Freud called it, represents the individual's wish to redo the traumatic event in a futile effort to master its overwhelming effects by evoking a sense of agency.[61] Masochistic repetition rarely brings relief. To the contrary, masochistic repetition "causes the violent rupture of the self, a profound experience of fragmentation and chaos."[62]

The law of confessions masks this messy, disruptive reality of unconscious guilt and self-punitive forces behind a veil of free will and voluntary choice. From a psychoanalytic perspective, we should worry about interrogation practices that, through degradation and humiliation, inflame a suspect's unconscious desires for punishment. Unrelenting hostile accusations of guilt "exert psychological pressure on the suspect. . . . They carry out the demand that the suspect stop denying, bend to the will of the interrogator, and confess."[63] At some point, such interrogation practices may lead to the development of a sadomasochistic encounter, one at the opposite extreme from the feigned benevolent relationship created by false sympathy. In *Miranda*, the Supreme Court described these interrogation dynamics: "[The interrogator] 'must dominate his subject and overwhelm him with his inexorable will to obtain the truth . . . with no respite from the atmosphere of domination.'"[64] An interrogation with sadomasochistic overtones might be fostered by degrading statements such as "You are worthless," "Everybody knows you are nothing and your life is nothing," and worse. Such accusations work "to break down the suspect's resistance by silencing him, rendering him passive and ultimately inducing resignation and despair."[65] These tactics may work particularly well when unconscious self-destructive urges already pervade the suspect's psychic life, now ignited by the accusations being hurled against him. Criminal suspects who have suffered from early childhood trauma may be especially vulnerable to the unleashing of ungovernable desires for punishment.

Surprisingly, a psychoanalytic perspective on unconscious self-destructive urges can be found in footnote 27 of the *Miranda* opinion itself. In this footnote, Chief Justice Warren notes that "[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible," quoting the preeminent medieval Jewish thinker Moses ben Maimon (Maimonides):

"To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree."[66] Jewish law prohibits all confessions, voluntary or not.[67] Maimonides understood the law's prohibition to rest in part on the insight that self-destructive urges might lead an accused to falsely confess. "The [Court] . . . is not empowered to inflict the penalty of death or of flagellation on the admission of the accused. For it is possible that he was confused in mind when he made the confession. Perhaps he was one of those who are in misery, bitter in soul, who long for death, thrust the sword into their bellies or cast themselves down from the roofs. Perhaps this was the reason that prompted him to confess to a crime he had not committed, in order that he might be put to death."[68] In Maimonides's view, Jewish law excludes all confessions because they are inherently unreliable.

Warren's footnote 27 does not stop with Maimonides, but goes on to cite Norman Lamm's 1956 article "The Fifth Amendment and Its Equivalent in the Halakhah."[69] In this article, Lamm argues that Maimonides anticipated "a major achievement of psychoanalysis."[70] In Lamm's view, "modern psychoanalytic theory supports Maimonides' explanation of the [ancient Jewish] view of self-incrimination, an explanation which relies on the universality of the instinct of self-destruction."[71] And a year later, the Supreme Court returned to Freud in *Garrity v. New Jersey*.[72] Justice Douglas, writing for the Court, invoked Maimonides, Lamm, and Freud for the purpose of highlighting the law's "concern for saving man from his own destructive inclinations."[73] Douglas quotes extensively from Lamm's discussion of psychoanalysis, including the following paragraph explaining the connection between Maimonides and Freud:

> The Halakhah, then, is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. . . . While certainly not all, or even most criminal confessions are directly attributable, in whole or in part, to the Death Instinct, the Halakhah is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its

> function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides' interpretation of the Halakhah's equivalent of the *Fifth Amendment*."[4]

The Supreme Court's turn to psychoanalysis in the context of confessions was short-lived, but both *Miranda* and *Garrity* draw our attention to police tactics that strategically inflame the accused's self-destructive urges. Accusations that degrade or humiliate the accused may lure him into a sadomasochistic encounter that threatens the voluntariness and truthfulness of any confession to the crime. The danger is not confined to a few masochistic individuals. Understanding the role of unconscious guilt in psychic life opens the door to a more psychologically nuanced understanding of how degrading police tactics can inflame self-destructive urges in a forced sadomasochistic relationship between dominant accusers and an abject, self-punitive accused.

As with feigned sympathy, degrading interrogation tactics that exploit an individual's self-destructive urges should be reviewed with care under the Due Process Clause's test of voluntariness. Careful judicial scrutiny does not mean that every case will require a long, drawn-out inquiry into a defendant's state of mind. No one is suggesting that defendants and interrogators be put on the couch. Objective standards for police conduct can be established over time. But false sympathy and degradation tactics should be evaluated under the Due Process Clause to ensure that they do not overpower an accused's powers of resistance, thus crossing a judicially discernable constitutional line against the use of involuntary or false confessions.

Displacement and Trickery

Psychoanalytic views on unconscious guilt provide an important explanatory framework for the puzzling phenomenon of false confessions. Law presumes that only a truly guilty person would have a guilty conscience for the crime. But clearly not all suspects who confess are actually guilty. DNA exonerations, laboratory studies, and surveys of prisoners and police investigators confirm that false confessions play a significant role in the criminal justice

system.[75] Experts speculate that the documented cases only represent "the tip of the iceberg."[76] We would not be overstating the problem in concluding that police-induced false confessions constitute one of the most serious causes of criminal injustice.[77]

We have already seen how desire for punishment may be exploited to coerce a suspect into confessing to a crime that he did not commit. Here we will examine false confessions more closely. A psychoanalytic inquiry reveals that certain police tactics—most important interrogation "trickery"—run the risk of displacing guilt from one bad act to another, leading some innocent individuals to confess to crimes. What turns fantasy into reality—what motivates the false confession—is guilt relating to some other wrongful act, real or imagined.[78] Unconscious guilt for prior transgressions may generate the psychological uncertainty that allows police suggestion to take hold. Law thus overlooks the one factor that might best explain the psychology of false confessions: the presence of a guilty conscience, but *for something else*.[79]

In *Miller v. United States*, Chief Judge David Bazelon famously explored the phenomenon of the innocent accused. It was a seemingly innocuous case of pickpocketing.[80] On a summer day in 1961, Cornell Watson took the bus home from work. As he was boarding the bus, he felt a slight jostle and soon discovered that his wallet was missing. Other riders reported that two men had just exited the bus and fled down the street. Watson immediately followed, entering an alley where he saw four or five men, including Lawrence Miller, looking through a wallet. Watson yelled, "Hey, that's my wallet. Give it back to me." Miller then took flight. Watson chased Miller, who purportedly had possession of the wallet, for several blocks until Miller suddenly stopped and turned back toward Watson, saying, "Here, man, take this dollar and my ring and I will go back and get your wallet." Watson took the dollar, and about then a police officer arrived and arrested Miller. During the ensuing excitement, an unknown person returned the wallet to Watson. No one either saw Miller pick Watson's pocket or identified him as one of the men on the bus. He was convicted by a jury and received an astonishing two-to-six-year sentence.[81]

The most damning piece of evidence tying Miller to the crime of pickpocketing involved Miller's flight from the alley. The trial judge had given

the jury the following instruction on the significance of flight: "[Y]ou are entitled to draw from testimony which you accept as credible a conclusion that flight on the part of a defendant was or is evidence of guilt."[52] The court of appeals agreed with Miller that this instruction was wrong, and reversed the conviction, sending the case back to the trial court for a new trial. The opinion was a short *per curiam* statement: "The judgment of the District Court is reversed."[53] But Chief Judge David Bazelon wrote an opinion setting out his individual views on the significance of Miller's flight from the alley. His opinion was long, but the point can be succinctly stated: Bazelon did not believe that flight necessarily indicates actual guilt. He did concede that flight can indicate a guilty conscience. But drawing on psychoanalysis, Bazelon argued that a guilty conscience does not always mean actual guilt for the crime charged. By running, Lawrence Miller may have enacted the equivalent of a false confession to the crime.

Bazelon plunged into psychoanalytic theory to explain why an individual might develop a guilty conscience for a crime he did not commit, referencing thirty-nine psychoanalytic sources to make the point. Early in his career, Freud had described the phenomenon in a talk given to law students: "You may be led astray . . . by a neurotic who reacts as though he were guilty even though he is innocent—because a lurking sense of guilt already in him assimilates the accusation made against him on this particular occasion."[54] Freud stressed that unconscious guilt for some earlier transgression underlies the present self-incriminating behavior. The individual *does* have a guilty conscience, just not for the act he is accused of committing. The individual may have confessed his guilt through behavior, but this "confession"—while true at the level of psychic experience—falsely implicates him in a crime he did not commit. We do not know whether Lawrence Miller was innocent or guilty of the pickpocketing when he ran from the alley. As many jurists of the day recognized, Miller might have run for all sorts of reasons, including simply a childlike scramble to avoid getting into trouble. Miller may also have run because he had a "consciousness of guilt" about the wallet in hand. But Bazelon forces us to consider that Miller's guilty conscience might actually have referenced some other act of wrongdoing.

The displacement of guilt reflects the kind of unconscious transference phenomenon common in mental life. Freud used the term "displacement" to describe how the mind disguises the latent meaning of a dream with the seemingly unrelated and often bizarre manifest dream content.[85] But the mind's capacity for displacement extends well beyond dreamwork. Displacement operates along a continuum from simple reminiscence to fantasizing to psychosis: at one end, the reactivated feeling states of a prior time—Proust's experience of the madeleine, for example—and at the other end, a full-blown, delusional reliving of past relationships and experiences in the present. Transference captures the idea that beliefs, emotions, and memories can shift in time and space. While they are highlighted in the analytic relationship, early childhood experiences resonate in all our important relationships. Our adult lives are enriched and made meaningful by the migration of feelings, perceptions, and wishes from past to present. We view the world and other people through these well-worn psychic pathways. Psychoanalysis is a mode of treatment designed to change these transference patterns when they cause problems or suffering.

Like all emotions, therefore, guilt migrates. It can undergo displacement "such that the individual's experience of guilt about one issue may obscure a more intense guilt about another."[86] Guilt for the earlier violation—real or fantasized—unconsciously shifts to later acts of wrongdoing leading an individual to behave *as if* he were the truly guilty party. We have already encountered the kind of guilt everyone can feel from riding the strong aggressive currents of childhood. But the migration of guilt can be more immediate. Bazelon quotes Freud for the example of an innocent child accused of some wrongdoing, who nevertheless acts like a guilty transgressor because of guilt over some other violation of parental strictures.[87] More examples come easily to mind. One might feel relatively little conscious guilt around the death of a parent, but collapse with self-accusations upon the subsequent death of a beloved pet. One might feel no remorse after abruptly ending a close friendship, only to succumb to violent self-reproach following a minor dispute with another. One might be mysteriously overcome with guilt upon the commission of a trivial offense, unaware of the effect of an earlier, much more serious wrong. The sufferer knows herself to be guilty of something,

although the true source of the guilt remains securely locked out of awareness.

The displacement of guilt explains the phenomenon of false confessions, at least in some cases. The displacement from past to present serves two needs simultaneously. The present confessional behavior (the running, the collapsing, the self-reproach) both rationalizes unconscious guilt and alleviates it by way of the resulting punishment.[58] A false confession rationalizes unconscious guilt by attaching it to some known transgression. This migration of guilt reassures: "Now I understand why I feel so guilty." One's identity as a wrongdoer is externally verified. The accused may have done other bad acts in her life for which she feels she deserves to be punished, or she may suffer from guilt over fantasies dating back to early childhood. A false confession thus has an integrating effect for an individual suffering from unconscious guilt to the extent it brings psychic truth into line with external reality. But false confessions also punish. They gratify the individual's desire to atone for the earlier crime. False confessions both explain the guilty conscience and carry out the sentence.[59]

Psychoanalytically, we should be skeptical about interrogation practices that foster the displacement of guilt, in other words, that specifically target guilt for behavior other than the crime at hand. Such police tactics include focusing upon an accused's guilt for other bad acts, such as drunk driving, domestic violence, or child neglect. Police interrogation that veers off course in this way—that focuses its attention on matters unrelated to the crime—weakens the reliability of any subsequent confession. By confessing, an innocent accused may simply be submitting to the demands of a guilty conscience for punishment. When designed to enhance guilt for other, unrelated bad acts, police tactics may justify the false confession in the mind of the accused, at least in the moment. Law assumes that guilt-inducing tactics aimed at unrelated wrongs merely open the door to a suspect's admission of actual guilt for the crime at hand. But psychoanalysis suggests, to the contrary, that confessions obtained as a result of police interrogation focused on amplifying guilt for other bad acts can exploit the psychic needs of innocents.

Psychoanalytic views on the displacement of unconscious guilt give us insight into the rare but mystifying phenomenon of innocent individuals

who come to *believe* that they are guilty of the crime, even momentarily. Internalized false confessions, as they are called, are an empirically documented phenomenon.[90] The story of Paul Ingram is a well-known example.[91] Ingram was a police officer living in Olympia, Washington. In November 1988, Ingram's two adult daughters accused him of having sexually assaulted them starting when they were five years old and continuing throughout their childhood. As the days and weeks went by, the daughters' stories became increasingly elaborate. They alleged that Ingram's friends raped them during orgies at their house, that their mother would "prepare" them for the abuse, and that the abuse extended to satanic rituals involving the slaughter of babies. At first, Ingram responded to his daughters' allegations with bewildered self-doubt: "I can't see myself doing this . . . [but t]here may be a dark side of me that I don't know about."[92] Under police interrogation, he soon began confessing to raping his two daughters. Over the course of the next six months, Ingram admitted to an increasingly implausible series of offenses roughly echoing his daughters' accounts, culminating with descriptions of orgiastic satanic ritual abuse involving scores of people, dead babies, and bestiality. But the girls' accounts were riddled with contradictions and obvious falsehoods, and Ingram's confessions could not be corroborated. Nevertheless, he pleaded guilty to six counts of aggravated rape and was sentenced to twenty years in prison. While we cannot know what really happened in this family, Ingram was almost certainly innocent of the most bizarre crimes.

Paul Ingram's belief that he committed the crimes eludes rational explanation. He began the interrogation believing in his own innocence, but somewhere along the way fantasy took over. How are we to make sense of this strange turn of events? Social psychologists focus on an accused's psychological suggestibility, a trait that, in the view of many, explains an individual's susceptibility to self-doubt about historical truth.[93] The study of suggestion has a distinguished history in psychology. The phenomenon was the focus of the renowned European hypnotists of the late nineteenth century, such as the French neurologist Jean-Martin Charcot, who studied the role of suggestion under hypnosis in curing hysteria. Modern behavioral scientists contend that individuals can develop uncertainty about what

happened in situations where police interrogators aggressively "suggest" that the individual committed the crime.

Psychoanalysis gives us some guidance in understanding why certain individuals are more suggestible than others under interrogation. Of course, we are all prone to some level of suggestion. We are influenced, swayed, and persuaded by others in all sorts of situations. Yet not *any* suggestion or accusation exerts a reality-loosening pull on our minds. Some people may be innately more suggestible than others, in the same way that some are more prone to daydream or to dissociate. But psychoanalysis raises the possibility that suggestibility is heightened when an individual feels strong unconscious guilt for some earlier, unrelated transgression. When the suggestion of culpability matches the unconscious guilt—when the outward accusation confirms an inner truth—then the accused may be led to believe it. A false confession answers the question: What have I done to justify the guilt that is causing me so much distress?

Paul Ingram expressed guilt for behavior other than the crime of child sexual assault. He felt he had been an abusive and cold father.[94] "I have a hard time hugging [my children], or even telling them that I love them, and, uh, I just know that's not normal."[95] His children were likely exposed to some group sexual activity in the house. At one point, he threw an axe at one of his sons in anger.[96] The interrogation led him to the point of lamenting, "I wasn't a good father."[97] It also led the police interrogators to exploit this guilt. "I hope you're not going to make these girls go through a trial," was one of their tactics.[98] Paul Ingram was not likely guilty of sexually abusing his daughters, but accounts of the interrogation indicate strong feelings of guilt for other forms of child abuse: corporal punishment, emotional berating, lack of affection. We do not know why Ingram confessed. But we can speculate that his confession may have been a way of expiating overwhelming feelings of unconscious guilt over these *other* transgressions.

These psychoanalytic insights into the migration of guilt also raise concerns about police interrogation that relies on trickery. Interrogators lied to Ingram when they told him that his daughters had accused him of certain acts. The Supreme Court currently allows such police deception.[99] Police

investigators can lie about having videotape evidence that a suspect committed the crime when they do not; they can tell her that she failed a polygraph test when she passed; they can pretend that other people under investigation have named her as the perpetrator when they have not. There may be many reasons to oppose police trickery, including the belief that the state should be prohibited from lying to suspects as a matter of fundamental fairness and human dignity.[100] Justice Brennan said as much: "'The deliberate use of deception and manipulation by the police is incompatible 'with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means.'"[101] But psychoanalysis uncovers another stratum of concern.

Police deception casts doubt on confessions obtained by leading suspects into believing that concrete evidence of their guilt exists when none actually does. "[T]he presentation of false incriminating evidence—an interrogation ploy that is common among the police and sanctioned by many courts—can induce people to internalize blame for outcomes they did not produce."[102] Given these tactics, a person under stress, like Paul Ingram, may actually begin to doubt his own mind. Did I in fact commit the crime? Did I repress my memory of the act? Do I have a hidden dark side? Ingram said it himself: "It's almost like I'm making it up, but I'm not."[103] In the mind of the innocent accused, unconscious guilt corroborates the false evidence. Thus trickery may not ferret out the truth. To the contrary, police deceit may undermine the accused's capacity to keep his unconscious guilt from validating the false accusations.

Psychoanalysis works at the boundary between psychic and historical truth. While psychoanalysis "insists on the work of patient and analyst—comparable to confessant and confessor—toward the discovery of the most hidden truths about selfhood," the "truth" arrived at in psychoanalysis is not necessarily truth in the sense of representing some material or historical reality.[104] In psychoanalysis, the patient reluctantly divulges the truth about her subjective experience, one that may or may not conform to events or experiences in the real world. As we have seen, confession may be true to an individual's subjective experience but false in fact. When an accused says "I did it," law interprets these words as a statement about historical reality

rather than, possibly, an expression of unconscious guilt for some other bad act, real or imagined. Confession "can be the truth of desire, of affect, of that which makes sense of things in an emotional register."[105] And when the confession is given to the police—not to a priest or analyst, but to a punishing representative of the state—psychic truth *becomes* historical truth in the form of a guilty verdict. From a psychoanalytic perspective, police interrogation that uses trickery can transform psychic guilt into actual guilt, and thus lead a suspect to confess to a crime he did not commit.

Can law absorb psychoanalytic insights into unconscious guilt without unduly compromising the state's ability to elicit confessions from the truly guilty? Psychoanalysis opens our eyes to the ways in which our criminal justice system resorts to the fiction of free will in the face of a much more complicated psychological reality of unconscious desires for forgiveness, self-destructive wishes, and displaced guilt. Obviously the criminal law cannot be tailored to every irrational nuance in human nature. But the legal fiction of the freely choosing actor simply cannot be squared with the full range of psychologically coercive tactics of criminal interrogation currently allowed by law. Psychoanalysis illuminates how interrogations utilizing false sympathy, degradation, and trickery can lead to involuntary and unreliable criminal confessions.

Given psychoanalytic concerns about false sympathy, degradation, and trickery, courts should be careful to evaluate these methods of interrogation with a close eye for voluntariness and reliability.[106] Justice Frankfurter best described the challenge: "The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."[107] Obviously, these methods of interrogation cannot be eliminated entirely, in part because law enforcement legitimately uses less severe forms of them, and in part because eliminating *all* traces of sympathy, degradation, and trickery would be impossible. All human interactions are emotionally colored, to some extent, and all pressure tactics have some element of deceit, however small. By drawing attention to the risk associated with these methods, however,

psychoanalysis ensures that the most egregious practices can be eliminated from our criminal justice system. Psychoanalytic insights into unconscious guilt will not revolutionize the law or threaten law's general presumption of free will, but they will hold law to its own best ideals of fundamental fairness in the interrogation room.

FIVE

Intimate Contracts

Contracts entered into by people in certain intimate relationships have traditionally been subject to special legal rules. As we have seen in the area of criminal responsibility, the law presumes that individuals are capable of conscious, deliberate, autonomous decision-making for which they can and should be held legally accountable. In most areas of contract law, too, this presumption of free choice remains solidly intact. Courts generally treat the parties to a contract as self-interested legal actors engaged in arms-length negotiations over terms to which they will be strictly bound. This prevailing model of contract law assumes that fully informed decision-makers make free and voluntary choices to further their conscious preferences and goals. The model makes perfect sense in the context of commercial relationships where the paradigmatic contractual interaction is a one-time financial bargain between strangers.

But family contracts are another matter. These arrangements fall well outside the classic contract paradigm. Traditionally, contracts between family members—prenuptial contracts, separation agreements, adoption agreements, surrogacy contracts, contracts between spouses—have been either subject to court oversight or outright prohibited. Yet the free choice model is gaining ground. Courts increasingly apply the presumption of autonomous choice to agreements in the family law context as well.[1] Should intimate contracts be strictly enforceable in the same way as the typical legal bargain made by presumptively freely choosing, self-interested legal actors?

Psychoanalysis aids us in answering this now-pressing question. The intimate contracts under study here are of two kinds: prenuptial agreements between future spouses, where the soon-to-be marital partners bargain over income and assets, and gestational surrogacy contracts, where the parties,

sometimes strangers, bargain over bringing a child into the world. Prenuptial and surrogacy agreements look like traditional commercial contracts in many ways. They are, after all, almost always about money. The parties are sometimes represented by lawyers, and the agreements can be written in official, legal-sounding terms. Here is an example from a typical prenuptial agreement, complete with Latin flourish: "Frederick's obligation to make payment to Catherine for her support and maintenance or as alimony (including, without limitation, alimony *pendent lite*) shall be limited to and shall not exceed the $200 per week as above provided, and Catherine does hereby acknowledge that the foregoing provision for the payment of $200 per week is fair, just and reasonable."[2] Yet even the formal nature of these agreements cannot mask the meaning of their terms, which often are intended to limit a financially less-well-off spouse's share of the wealthier spouse's assets upon divorce or death, no matter the length of the marriage, the number of children, or the health of the parties. Similarly, gestational surrogacy contracts require the gestational surrogate to surrender parental rights upon the birth of the child, despite any unforeseen changed circumstances in the arrangement or relationships. In both cases, the parties make a decision to bind themselves to a future outcome in intimate matters. The fact that these contracts deal with issues relating to marriage, reproduction, support, children, altruism, and love clearly sets them apart from the usual commercial bargain.

Nevertheless, despite the unique nature of these agreements, courts and legislatures increasingly treat the parties as being fully bound by these intimate contracts. It was not always this way. In many states, prenuptial and surrogacy agreements were both legally banned, for reasons having to do with concerns about women's vulnerability to exploitation. But times are changing. The women's movement ushered in widespread changes in the law's conception of marriage, transforming what was once patriarchal privilege into a gender-neutral partnership open to persons of all sexes. Along with the partnership model has come the assumption that both spouses, male or female, are perfectly capable of freely bargaining over the terms of marriage.[3] From a different direction, the behavioral movement in legal scholarship imports cognitive research about decision-making into law, offering insights into predictable and systematic distortions, limitations, and

biases in individual decision-making. The behavioral legal model holds fast to the free choice paradigm, insisting that individual decision-making, while full of errors and biases, can nevertheless be improved through better information and "nudges" in the right direction.[4] Like the partnership model of marriage, the behavioral model sticks by the idea that individuals, once fully informed, should be free to fashion bargains of their own choosing in all spheres of life, including family law.

Psychoanalysis invites us to examine the ways in which the prevailing free choice model fails to acknowledge the troubling influence of unconscious factors on the formation and breach of intimate contracts. To be sure, many kinds of contracts engage the parties' unconscious hopes and expectations. Life's richness and tragedy draw from these hidden depths. Buying a flashy new car can reflect unconscious hopes that the purchase will magically lift a depression or boost self-esteem. The desire to own houses, jewelry, art—almost no domain of consumer purchasing evades our unconscious imaginings. Even straightforward financial contracts can tap into unconscious desires, as when unscrupulous financial lenders exploit the dreams of hopeful borrowers. Service contracts similarly engage unconscious hopes and wishes; bargaining for the terms of a new job can trigger fears about performance or hopes for advancement. In all these cases, the legal system rests comfortably holding people to the terms of their contracts despite the mobilization of unconscious forces.

Even with such powerful unconscious undercurrents at work, the law sensibly relies on a presumption of free choice. Our ideal of individual autonomy reflects the idea that people can and should shoulder the benefits and burdens of a contract's unconscious workings. The law's regime of strict contractual enforcement imposes a duty of self-examination on contracting parties to apprise themselves of their own motives, desires, and expectations before signing away their rights. In other words, the law requires individuals to overcome their own willful blindness to ask: Am I forfeiting important rights in this employment contract because I harbor unrealistic dreams about this new job? Do I believe a gift of jewelry will win back the heart of my beloved? Am I acceding to unreasonable contractual terms with my business partner because of guilt over my envy and aggression?

Intimate contracts, however, raise the stakes. They stand apart from other contracts not simply because of their subject matter but because they more reliably engage powerful unconscious wishes, fears, and anxieties difficult to assess through normal channels of self-reflection. By probing deeply into the psychology of intimate choices, a psychoanalytic perspective exposes those dimensions of the psyche overlooked in law's treatment of these contracts. Psychoanalysis teaches us about intimacy's heightened deployment of loving and aggressive feelings, as well as the powerfully strong resistances that block our awareness of these emotions in ourselves. As we will see in this chapter, psychoanalysis uncovers the subjective drama of intimate contracts: the role of fantasy and memory in constructing present reality; the desire to replay and to master old experiences; the ambivalences, conflicts, and paradoxes of unconscious life. Psychological phenomena in the form of unconscious fantasy, ambivalence, repression, attachment, regression, splitting, and resistance can color, distort, and undermine the parties' decision to enter into, and later abide by, intimate contracts in ways that go well beyond the ordinary commercial setting. Given these heightened concerns about choice, we will consider what the law's response should be when one of the parties to an intimate contract comes to court seeking to enforce—or nullify—the terms.

Prenuptial Agreements

In 1975, Catherine Walsh married Frederick Simeone.[5] At the time, Catherine was a twenty-three-year-old unemployed nurse and Frederick was a thirty-nine-year-old neurosurgeon earning $90,000 annually. On the eve of their wedding, Frederick presented Catherine with a prenuptial agreement to be signed. The agreement listed Frederick's assets at $300,000 and provided that, in the event of divorce, alimony payments would be limited to a total of $25,000. Without consulting an attorney, Catherine went ahead and signed the agreement. The marriage lasted a decade. During their divorce proceedings, Catherine argued that the terms of the prenuptial agreement limiting alimony were unreasonable, and therefore unenforceable under Pennsylvania law. The Pennsylvania Supreme Court upheld the contract as enforceable on its terms.

The decision in *Simeone* exemplifies the law's movement toward treating prenuptial agreements like any other contract freely entered into by rational actors. The Pennsylvania Supreme Court offered the standard observation that contracts are generally strictly enforced: "[c]ontracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains."[6] Not content with stopping there, the court went further in observing that traditional notions about women's limited bargaining power, which might at one time have justified nullifying the contract, were now outdated: "[p]aternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded."[7] Where both parties to the contract freely chose to sign, the court concluded, "spouses should be bound by the terms of their agreement."[8] Other state courts have agreed. In Connecticut, prenuptial agreements are now evaluated by the well-established rule that "parties are free to contract for whatever terms on which they may agree."[9] Even when presented for signature only hours before the ceremony, a prenuptial agreement will be upheld as the product of free choice. The Iowa Supreme Court, in response to claims that a challenged prenuptial agreement contained unreasonable terms, suggested that a would-be spouse offered unreasonable contractual terms on the eve of marriage should simply cancel the ceremony.[10]

It is not clear, however, that blind enforcement of prenuptial agreements is wise. Indeed, prenuptial agreements by their very nature beg for additional scrutiny as to the motivations of the parties involved. For why would any individual make the seemingly irrational decision to enter into an agreement that runs so directly counter to his financial self-interest? Prenuptial agreements are not always irrational, of course. For second marriages, the agreement might protect the interests of children from a prior marriage. Or both parties might have significant assets. But when the parties are young and likely contemplating children, or when only one party is financially secure, a prenuptial agreement will operate to the disadvantage of one party. It is possible that the financially stronger party has signaled an ultimatum:

sign the prenuptial or the wedding is off. In these circumstances, the financially weaker spouse may simply value marriage under the terms of the prenuptial agreement more highly than no marriage at all. But the decision then raises other questions about the irrationality of the bargain, including why someone would want to marry a partner unwilling to share the financial risk that the marriage will fail.

Cognitive psychology has something to say about the mystery of prenuptial agreements. Research shows that most prospective spouses are overly optimistic about the chances that their marriages will succeed. Studies in the 1990s revealed that people entering marriage estimated that 50 percent of American couples will eventually divorce, but these same people estimated that their own risk of divorce was zero.[11] Overoptimism also explains why so few people marrying for the first time enter into prenuptial agreements, even when it makes sense financially. As the research shows, prospective spouses do not deny the rates of divorce; they simply resist the fact—staring them in the face—that they, too, might suffer this fate. Whether prenuptial agreements are signed or not, prospective spouses are psychologically wedded, so to speak, to deny the reality of marital breakdown. Yet while cognitive psychology helps us to see the overoptimism in prenuptial decision-making, it fails to explain it. What accounts for the willful blindness surrounding marriage? Something more is going on than rosy confidence about living happily ever after.

We might be tempted to conclude that people's overoptimism follows from a simple desire not to know the high risk that something bad will happen. We need not be psychoanalysts to recognize that unconscious denial can play a role in fortifying overoptimism. When Catherine essentially signed away her rights to alimony in the prenuptial contract drawn up by Frederick, she may have been unconsciously denying the chances of divorce, or Frederick's motives, or her own financially vulnerable position. Still, the denial of the risk of future marital discord remains something of a puzzle, particularly when one spouse presents the other with a document anticipating that very event. It is one thing to bury one's head in the sand and do nothing. But it is another thing altogether to sign a prenuptial agreement with the attitude, "Oh, it will never happen to me." This denial differs

from the common forms of denial we all experience around the passage of time: the failure to save for retirement, or to draw up a will, or otherwise to acknowledge the finitude of life. The better analogy here is to an individual who signs a patently unreasonable will believing that it will never be needed, a level of denial going well beyond turning a blind eye to life's realities.

Psychoanalysis helps to explain why an individual might sign a prenuptial agreement whatever the personal cost. Whereas cognitive psychology suggests that the most important mental factor in mental life affecting couples on the eve of marriage is overoptimism, psychoanalysis would view this as only one half of the equation. From a psychoanalytic perspective, conscious optimism may mask a powerful underlying anxiety over marrying. Pre-wedding jitters point to the underlying worries that most, if not all, people have facing the reality of marriage. Consciously, these worries may include a fear that the intended spouse will not be the perfect partner, or a general anxiety about the long-term nature of the commitment. These worries may have unconscious roots in ambivalent feelings of love and hate going back to early childhood. Ambivalence in psychoanalytic hands is more than "maybe I shouldn't do this." Ambivalence is a true state of psychic conflict between loving and hating feelings toward an important person in one's life.

Psychoanalysts have long understood that ambivalence characterizes our basic orientation toward other people and the world.[12] The earliest infant attachment to caregivers displays an ambivalent state of splitting, where strong feelings of love and hate operate in isolated disconnection from each other.[13] An infant will scream in rage or frustration one moment and contentedly nurse the next. As children develop, they learn to integrate these opposing feelings of love and aggression into a more balanced, albeit ambivalent, view of the caregiver.[14] While at normal times the integration of these powerful, opposing feelings will prevail, under conditions of stress, mature adults can regress to perceiving others in all-good or all-bad terms. Even the most loving adult human relationships are infused to some degree—whether consciously or not—with negative feelings of doubt, frustration, and aggression. Balanced, integrated, gray feelings are the sign of a developed, mature relationship.

Romantic love may be the only arena of adult life in which splitting—experiencing another in all good or all bad terms—is considered "normal." Far from being treated as pathological, the idealization of romantic love is considered a welcome, universal facet of the human condition. Idealization evolves as a normal part of the development of mature romantic relationships, despite the obvious distortions, repressions, and denial of the loved object's less positive attributes. Yet idealized romantic love does not mean that its emotional counterpart does not exist. To the contrary, negative feelings toward a love object, the split-off aggressive feelings, will be deeply repressed. It comes as no surprise that less loving feelings toward the intended spouse are blocked from mind. With time, the love and aggression will likely integrate into a more balanced, stable, and mature set of feelings, which is why the purity of romantic love is difficult, if not impossible, to maintain over the long run.

The phenomenon of unconscious ambivalence helps to explain why individuals cling so tenaciously to the belief that they will never divorce, despite the incontrovertible statistics. When feelings toward another are split into conscious idealized love and unconscious aggression, individuals will go to great lengths to protect the positive side of the ambivalence from contamination. This repression of negative feelings toward the intended spouse may be an important factor affecting the individual's ability to assess realistically whether to enter into a prenuptial agreement. In a state of romance, where positive and negative feelings are split off from each other, acknowledging the less positive feelings risks tipping the valence of emotions in the opposite direction. Presented with a disadvantageous prenuptial agreement, an individual must deny the negative affect at all costs, *literally*. A financially well-off spouse proposing the prenuptial agreement may also experience romantic idealization, although her more negative feelings ("He'll never get my money!") find concrete expression in the contract itself, even if its presentation is accompanied by conscious reassurances of undying love and support.

Psychoanalysis thus focuses our attention on a set of questions relating to what individuals contemplating marriage might imagine about their future together. What unconscious feelings of hatred, anger, or aggression might

be playing a role in a spouse's decision either to insist on or to accede to an unreasonable prenuptial agreement? How might unconscious ambivalence toward the other spouse differ depending on whether this is a first or subsequent marriage? To what extent does the unconscious splitting of love and aggression affect how individuals imagine their future spouse will behave in the event of divorce? How do past experiences, such as deprivation in early childhood, affect the intensity or quality of an individual's views of the intended spouse or marriage? Does one spouse's insistence on a prenuptial agreement provoke in the other spouse regressive submission to an emotionally more powerful figure reminiscent of childhood?

Once we recognize the psychological complexities surrounding prenuptial agreements, we face the legal question of how to regulate them. Behavioral legal scholars advocate for "debiasing" the parties to a prenuptial, that is, correcting for overoptimism at the time the contract is signed. This approach includes a variety of procedural techniques aimed at informing parties about the benefits and drawbacks of prenuptial agreements.[15] These debiasing techniques provide both prospective spouses with accurate information about the long-term prospects for the marriage, give them adequate time to consider the options, and generally improve the prenuptial decision-making process through attorneys, mandatory counseling, and waiting periods.

Psychoanalysis does not outright reject procedural safeguards directed to improving parties' decision-making, but it does question their effectiveness. Because the cognitive perspective focuses on correcting for conscious overoptimism, it misses the unconscious repressed fears and anxieties that might lead an individual to sign away her interests. The emotional complexity surrounding prenuptial agreements rules out the possibility of simply setting the parties straight, fine-tuning judgment, or otherwise transforming the premarital contract into an arms-length rational negotiation. From a psychoanalytic perspective, supplying individuals with more information or time will not overcome their resistance to knowing certain things, including the less positive feelings being repressed. These less positive feelings might include unconscious anxiety or fear about the future, as well as unconscious anger at the idea of the prenuptial agreement in the first place. Overcoming resistance is not easy in any circumstances, but particularly difficult on the

eve of marriage when powerful emotional currents run against self-inquiry. A legal rule requiring that both parties be represented by counsel might go some distance toward overcoming the natural resistance to understanding the implications of the bargain, but legal representation would not necessarily ensure self-knowledge; a prospective spouse might resist the lawyer's entreaties as well. Guilt over ambivalent feelings might further fortify the resistance. Given all these potential obstacles, we should be skeptical about the ability of procedural reforms alone to open up the parties' true feelings on the eve of marriage.

In light of these hurdles—repression, resistance, splitting, and the general denial of bad news—it is not surprising that the legal system engages in its own form of denial by simply ignoring this psychic drama altogether and strictly enforcing the contract. Certainly it is unrealistic, and frankly undesirable, to attempt to examine the unconscious reasons behind any particular individual's decision to enter into a prenuptial agreement. Because law cannot psychoanalyze the parties to a prenuptial agreement, we may be tempted to conclude that the only option is strict enforcement. Yet abandoning individuals to their ill-advised choices in this context is neither just nor necessary. Psychoanalysis supports an equitable approach to the enforceability of prenuptial agreements, one that takes into account the ambivalence and complexity of intimate decision-making, but that does not require putting contracting parties on the couch. It joins forces with behavioral legal scholarship in calling for legal representation of both parties to a prenuptial agreement, but goes further in supporting additional reforms. Psychoanalysis would support a system of judicial review before the contracts are given legal force, or would limit lawful prenuptial agreements to a few model contracts already vetted for general fairness.

Most important, psychoanalysis leads us to consider a regulatory regime that resists modern moves toward strict enforcement in favor of giving judges discretion to determine whether the contract is "unconscionable"—in other words, whether it was fair and reasonable at the time it was signed. Judges cannot know what went on in the parties' minds at the time of signing, but they can see and assess the result. The psychological complexities that surround prenuptial decision-making justify giving the court this reviewing power. Retrospective

assessment of the parties' interests and expectations cannot fully capture what a spouse should have known and anticipated at the time of marriage. Nevertheless, a court can assess the fairness of the terms given what the parties faced at the time of marrying: their prospects for employment, their understanding regarding children, their concerns over health. In Catherine's case, for example, the waiver of all alimony over twenty-five thousand dollars at a time when she was unemployed would have raised serious fairness concerns, particularly in an era when wives were not expected to work.

A retrospective review requires the judge to revisit the decision to sign the prenuptial agreement from a more objective, emotionally balanced perspective. Psychoanalysis puts faith in judges to engage in decision-making that is *relatively* free from unconscious bias. While no decision we make ever escapes unconscious influences entirely, we can still safely presume the rationality of judges reviewing prenuptial agreements for substantive fairness, in the same way that we presume an analyst remains emotionally stable in the midst of a patient's transference storm. As emphasized throughout this book, a psychoanalytic approach to law does not upend the law's presumption of rationality, broadly speaking. Judges will of course have their own biases, in the same way that analysts may have countertransference feelings of their own. But judges are not directly engaged with the strong emotional currents experienced by the parties. They are well positioned to reflect upon what unconscious wishes, beliefs, and assumptions they may be bringing to the case at hand. Judges—like analysts—operate under a professional imperative to reflect upon their own decision-making process.

This psychoanalytic proposal for a retrospective, substantive review of prenuptial agreements reflects in part the complexity of individual decision-making in this area, but also, more important, the limitations of adjudication. Not only might unconscious forces be at work, but legal decision-makers are in no position to uncover the specifics in any particular case. The parties' motivations, whether conscious or unconscious, are neither accessible to judicial modes of inquiry nor triable by typical standards of proof. Because we cannot know what really went on in the minds of the parties to prenuptial agreements, with its dizzying emotional dynamics, courts must satisfy themselves with objective markers for determining whether to enforce or nullify the contract.

The stance calls for judicial humility: a recognition that courts are simply not in a position to know, with any certainty, what forces drove the parties to sign. In these circumstances, resorting to an objective standard—what is fair and reasonable in the circumstances—is paradoxically a psychoanalytically informed solution to a seemingly intractable adjudicative problem.

We have seen elsewhere how the turn to objective standards can be motivated by a recognition, rather than a denial, of the complexity or unknowability of subjective life. Justice Holmes's turn to the reasonable person standard in part reflected these concerns.[16] Freud himself believed that psychoanalytic tools of inquiry have no proper role to play in the courtroom. Yet despite Freud's skepticism, there *are* times when close scrutiny of a person's present intent or motivation is necessary, such as custody determinations, sentencing hearings, and the admissibility of confessions. But the enforcement of prenuptial agreements is not among them, in part because what motivated the parties to enter into the bargain happened years earlier. In these circumstances, an objective standard of reasonableness ensures the fairness of the bargain in the particular case.

Imposing a standard of retrospective review for substantive fairness—one justified by psychoanalytic insights—will not dramatically change the law in the many states that still allow for substantive review of a prenuptial's terms. Yet it will certainly stem the tide of strict enforcement of these contracts regardless of the circumstances. Psychoanalysis provides a powerful and compelling explanation for why prenuptial agreements differ from contracts outside the realm of family law, and thus why some judicial control over these contracts is still warranted. Catherine deserved a court's careful look at her prenuptial agreement, not only because she was the weaker party to the contract but because her choice to sign may have been driven as much by repressed fears and anxieties as by love.

Gestational Surrogacy Contracts

Psychoanalytically, surrogacy presents a more complicated psychological picture than prenuptial agreements. Surrogate mothers agree to relinquish the child they have carried at birth to the "intending parents," in other

words, the parties who intend to raise the child. In traditional surrogacy, the birth mother is genetically related to the child; the biological father may be, but is not always, one of the contracting parties. Traditional surrogacy cases typically treat the surrogate as the legal mother of the child.[17] As with non-surrogate mothers contemplating relinquishing the child for adoption, traditional surrogates almost always have the right to change their minds for some period of time after the birth.

Unlike a traditional surrogate, a gestational surrogate is genetically unrelated to the fetus she carries; the egg comes from someone else, either the intending parent or a third party. According to some estimates, "ninety-five percent of surrogacy contracts involve . . . surrogates [who] are not the genetic mothers of the children they bear."[18] Most states still do not have laws on the legality of gestational surrogacy contracts but, as with prenuptial agreements, the trend appears to be running in the direction of full enforcement.[19] A fully enforceable agreement means that a gestational surrogate has no right to change her mind once she signs the contract.[20] If a gestational surrogate attempts to keep the baby, the intending parents are entitled to the remedy of specific performance, which means a judicially enforced physical taking of the child. Courts justify strict enforcement by referencing the parties' free choice to contract over bringing a child into the world. As the Ohio Supreme Court held, "If the parties understand their contract rights, requiring them to honor the contract they entered into is manifestly right and just."[21] Yet the psychodynamics of a gestational surrogacy arrangement raise questions about a regime of full enforcement. We should pause to consider whether this trend toward full enforcement adequately considers the decision-making experience of the parties and the gestational surrogate in particular.

An ultimately successful case of gestational surrogacy helps us to see the difficulties and benefits of gestational surrogacy agreements. In 2007, Shawn Hargon and Anthony Raftopol, a same-sex couple living in Connecticut, entered into a gestational surrogacy agreement with a woman named Karma Ramey.[22] The agreement provided that embryos created from donor eggs and Raftopol's sperm would be implanted in Ramey's uterus. The *in vitro* procedure took place, and a daughter was born. Hargon and Raftopol were

named as parents on the birth certificate. Having successfully negotiated this surrogacy arrangement, the three participants then entered into a second agreement that led to the implantation of more embryos created from the same egg donor and Raftopol. As a result of this second *in vitro* procedure, Ramey gave birth to two boys. Once again, Ramey willingly abided by the gestational agreement and surrendered the children after birth. She also consented to the termination of parental rights and the adoption of the children by Hargon.

Trouble arose, however, when the Connecticut Department of Public Health refused to issue birth certificates naming Hargon as the second parent of the twin boys. Although it had not protested the first time around, the department now argued that Hargon could not be named as a second legal father on the boys' birth certificates, despite the surrogacy agreement and Ramey's full consent to the termination of her rights. The department defended its position on the ground that Hargon was neither genetically related to the children nor an adoptive parent. Eventually the Connecticut Supreme Court decided in favor of the fathers, holding that Hargon became the legal father of the children solely by virtue of the surrogacy contract. By strictly enforcing the contract, the court gave Hargon the full rights of fatherhood and released Ramey from becoming a legal parent against her will.

Despite its troubled beginnings, the *Raftopol* case exemplifies a successful gestational surrogacy arrangement in which all parties happily live up to their promises. Most gestational surrogacy arrangements end this way, with surrogates often expressing a sense of relief and accomplishment upon delivering the baby to the intending parents. Studies show that "surrogate mothers generally report being quite satisfied with their experience as surrogates."[23] But contracting for childbirth, as we might expect, is not without its difficulties. Trouble occurs when either the gestational surrogate or the intending parents seek to breach the surrogacy contract. Understanding these relatively few but nevertheless important cases can contribute to fashioning legal rules that help protect those gestational surrogates who come to doubt their decision but nevertheless stick to the bargain. The goal here is to facilitate the successful outcome of gestational surrogacy contracts for all parties involved.

The trend toward full enforcement reflects the now-familiar model of free will in law. A gestational surrogate has chosen to sign away her parental rights, and, by strictly enforcing the contract, courts are doing nothing more than recognizing the bargain that the surrogate herself freely chose. Law treats the gestational surrogate as an autonomous actor at the point she decides to sign the contract. Whatever unanticipated regret she later feels might make her a sympathetic figure but does not do away with the fact that she, as a free agent, willingly entered into the contract and bound herself to its terms. In this view, to treat her otherwise would be to resurrect old paternalistic notions of women's contractual infirmities. As the California Supreme Court concluded, "[t]he argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law."[24] This view insists that the law should treat a gestational surrogate like any other individual entering into an important contract, such as buying a house or starting employment. People may act rashly or foolishly and later regret their decision, but we do not void the contract or allow them to back out. In this view, the trend toward full enforcement honors the gestational surrogate's autonomy.

The free choice model provides a descriptive framework—autonomous, intentional, voluntary choice—for the gestational surrogate's decision to enter into the contract, but it also bears on any subsequent change of mind. If a gestational surrogate develops a desire to parent the child, then, so the argument would go, she has simply freely chosen to desire that which is forbidden. The autonomous choice model posits that a gestational surrogate—in part because she lacks a genetic relationship to the child—has the power to resist becoming psychologically attached to the child. "[S]urrogates who are not also genetic mothers, unlike traditional surrogates, might be expected *not* to form a maternal bond with a child, who 'belongs' to others."[25] This perspective posits that the gestational surrogate has control over the development of attachment feelings. Unlike a traditional surrogate, who is genetically related to the child, the gestational surrogate's lack of a genetic connection is understood to give her greater psychological resources for weathering any

emotional pulls toward the fetus. She stands in the shoes of a foster parent, caring physically for a fetus but with the capacity to remain emotionally distant.[26] If attachment desires develop, and the gestational surrogate changes her mind, it is because at some level she has allowed this to happen. To indulge herself in fantasies of parenthood is to violate the terms of the agreement by which she is fully capable of abiding.

This, at any rate, is the free choice model. When a gestational surrogate changes her mind, we suspect that—at some level—she allowed herself to do so. Implicit in the law's free choice model is a moral condemnation of the gestational surrogate. She is a fallen altruist. Perhaps she was lying about her intentions at the outset; perhaps she wanted all along to blackmail the intended parents; perhaps she changed her mind out of selfish desires. At best, perhaps she simply let herself be taken over by fantasies of parenting a child who did not belong to her. If we assume that the gestational surrogate has control over her attachment wishes, then we can feel justified in maintaining a regime of full enforcement for gestational surrogacy contracts. We may feel empathy for her, but we still hold her accountable for her choice. The free choice model—and the ideas about fairness, reliance, and autonomy upon which it rests—justifies strict enforcement of the contract.

The free choice model, however, papers over the reality of the subjective experience of a gestational surrogate. As a preliminary matter, we should want to know more about gestational surrogates before concluding that justice is served by treating all of the parties as freely choosing partners in the arrangement. A woman contemplating becoming a gestational surrogate will be motivated by concerns specific to her own circumstances.[27] She may be providing a child to a close relative who is infertile; she may wish to share her positive experience of child-rearing with childless individuals; she may have experienced being a wanted child herself and now hopes to relive that experience through the happiness of others; she may enjoy the physical feeling of being pregnant; she may be motivated by financial concerns.

Psychoanalysis opens up additional layers by addressing the unconscious factors—the troubling emotional undertow—that might influence and distort a gestational surrogate's decision-making. While psychoanalysis emphasizes individual uniqueness, it also uncovers certain psychological factors

common to everyone. Our minds utilize processes such as repression, transference, and denial; they engage in both reality-based thinking and fantasy; they undergo developmental changes over time; they struggle with conflict and ambivalence; they operate on both a conscious and an unconscious level. The point is not to put any particular gestational surrogate on the couch to determine her unconscious motives and conflicts. Rather, psychoanalysis helps us to see how common mental phenomena such as ambivalence, attachment, denial, and repression can operate to affect a gestational surrogate's decision to enter into or breach the contract.

Law tends to simplify human motivation as a way of making the regulation of behavior more manageable. It is undeniably easier to establish rules of conduct if we assume that people behave for specific reasons that are clear and readily identifiable. We assume an individual is motivated by economic greed when she steals money from her employer. We assume another is guilty when she confesses to a crime. We assume a dying person is motivated to tell the truth on his deathbed. And we assume a gestational surrogate is motivated by either altruistic desires or economic aims. But as psychoanalysts know, people's motivations are inherently more complex. With respect to gestational surrogacy agreements, it obviously oversimplifies matters to view the choices of gestational surrogates as motivated only by altruism or financial gain. Motives are rarely so pure. They operate within a psychic system that frequently—if not always—harbors unconscious feelings of an entirely different sort. In the realm of intimate contracts, the emotional intensity of the relationships—here, between the gestational surrogate and the intending parents—heightens the complexity of the dynamics surrounding the formation, performance, and enforceability of the contracts.

Contractual or not, pregnancy will usually—if not always—be accompanied by some degree of ambivalence.[25] It is simply not psychologically plausible that a woman carrying a child to term has *no* ambivalence about her condition. Even expectant parents carrying and intending to keep the child may have concerns—conscious or unconscious—about the loss of freedom, the burdens of child-rearing, the capacity to parent well, and the financial stress of child-rearing, all of which are perfectly natural doubts about such a serious and long-term undertaking. This portrait of ambivalence does not

even include psychodynamic concerns: whether one will fail in ways reminiscent of one's own parents; whether one will be able to prevent the child from feeling the anxieties and fears of one's own childhood; whether a second child will rob the first of love. When individuals have been trying to have a child for some time, the degree of conscious ambivalence may be very low, but the absence of conscious doubt is more likely a sign of strong repression than the lack of ambivalence. It may feel unacceptable to acknowledge conflict over having a child, particularly once a pregnancy is under way.[29] Anxiety about potential childlessness may block out these more complicated ambivalent feelings.

While all expectant parents will experience some degree of ambivalence inherent in the very nature of such an important and emotionally fraught life experience,[30] what do we know about the unique experience of a gestational surrogate? Research shows that most gestational surrogates report entering into the contract with altruistic rather than financial goals. "Contrary to popular beliefs about money as a prime motive, surrogate mothers overwhelmingly report that they choose to bear children for others primarily out of altruistic concerns."[31] Yet the altruism might be accompanied by deeper feelings as well. A gestational surrogate's desires might center on the happiness she will bring to the intending parents.[32] Psychoanalytically, her wishes might have transference elements to the extent that they draw from her own past family experience. A gestational surrogate might desire to reenact her own positive childhood experience of being a wanted child and bringing pleasure to her parents. Or conversely, she might be attempting to redo an early experience of having been an emotionally deprived child: "If only I could have had parents who wanted me this much!" She might also be imagining her gift to the intending parents as a replaying of the birth of her own children; she could be strongly identifying with the intending parents and projecting onto them her own joy at having children.

Yet even the most firmly felt altruism would rarely be without some degree of repressed doubt or ambivalence. From a psychoanalytic perspective, it would be surprising if a gestational surrogate had absolutely no attachment imaginings—however disguised—about the baby. Researchers have found that surrogate mothers may "rely on the use of denial to help make

their task easier."[33] That does *not* mean that a full-blown psychological attachment to the child will necessarily develop—far from it. Yet it does mean that thoughts about attachment, for example imagining a relationship with the baby, are likely to be there in some form or another. Imagining other scenarios—"What if I changed my mind?"—is part of what makes us psychologically complex creatures, and also what makes choice meaningful. Acknowledging that altruism can be laced with ambivalence does not detract from its moral worth. Indeed, one might argue that altruism is less worthy in a world where other-regarding acts come so easily. A psychoanalytic perspective that views a gestational surrogate as managing unconscious feelings of attachment to the baby should only increase our admiration for the many women who, feeling the pull of attachment desires, nevertheless keep to the bargain.

Recognizing that gestational surrogates have some degree of repressed ambivalence over the pregnancy helps us to understand how surrogacy arrangements can go wrong. A gestational surrogate's ambivalence will be colored by other relationships in her life, past and present. The altruistic desire to provide childless individuals with a baby will draw upon the gestational surrogate's own life experiences, perhaps her early childhood experience or that of her adult parenting, or both. While in many cases these life experiences will be positive, fueling the gestational surrogate's altruistic desires, it is also possible that conscious altruism will be accompanied by an unconscious desire to master difficult early life experiences or even trauma. From a psychoanalytic perspective, a gestational surrogate may be more likely to develop strong attachment feelings when early life experiences were difficult. When things go wrong in early childhood, individuals can be drawn to repeating the experience in an obviously futile effort to change the outcome of what happened in the past.

Understanding the gestational surrogate's efforts to master early trauma helps us to see the vulnerability of some gestational surrogates to reliving their early traumatic history. Emotional trauma—sometimes acute and sometimes at a low level over years—can leave an individual feeling deprived and unwanted.[34] Many will downplay early trauma or its effects on their present life as an understandable way of coping with overwhelming

feelings. Efforts to overcome early trauma through repression and avoidance may work but may also lead an individual unconsciously to enter into situations and relationships that tragically replay the earlier experiences. This replaying of the earlier trauma can become a repetition across generations with potentially tragic consequences.

Let us explore this possibility in finer detail. As noted, many gestational surrogates enter into the contract motivated by an anticipated sense of fulfillment in providing a baby to the intending parents, with this fulfillment deriving from any number of sources, including her own experience as a wanted, cared-for child. But research confirms that some women enter into surrogacy arrangements in the wake of prior losses. Twelve percent of surrogates in one study indicated that being a surrogate mother was an attempt to compensate for a prior loss.[35] A gestational surrogate with a history of early trauma might enter into the contract with an unconscious desire to redo her own early experience of having been an *un*wanted child. This hypothetical surrogate might consciously begin the process with the altruistic desire to bring a wanted child into the world. But the reality of the pregnancy could intrude on this fantasy by unexpectedly casting her as the rejecting mother and the baby as unwanted *by her.* As the pregnancy unfolds and the fetus becomes a felt reality, the surrogate, in her mind, might become her own rejecting parents. And at this point, this hypothetical gestational surrogate might feel she can perform a magical rewriting of history by changing her mind, thus turning an unwanted child into a wanted one. Her strengthening feelings of attachment to the fetus would reflect her own frantic efforts to keep herself from reliving her early history. While unconsciously she is attempting to rewrite her internal drama, in reality she will relinquish the child to the intending parents, leading to a tragic repetition of lost love.

Attachment issues during a gestational surrogacy relationship might also be stimulated by emotions at the other end of the spectrum, particularly anger and disappointment at the behavior of the intending parents. A gestational surrogate may be tempted to breach the contract when struggling with her own significant adult attachment issues that eventually erupt in the relationship with the intending parents.[36] We might initially assume that a woman with healthy attachment capacities—in other words, an ability to

feel and respond to the needs and emotions of others—might have the most difficulty resisting feelings for the fetus she is carrying. Paradoxically, though, a woman with healthy attachment capacities is more likely to separate herself emotionally from the child and more likely to negotiate the feelings of dependency vis-à-vis the intending parents that can arise.[37] The results of one empirical study showed that, for some surrogates, unmet expectations regarding the level of closeness with the intending parents led to feelings of dissatisfaction for the surrogate.[38] We see, then, that altruism may sometimes be accompanied by strong reciprocal needs for emotional nurturance and support. When this emotional reciprocity is absent—if, for example, the surrogate feels unappreciated—the result may be psychologically overwhelming.

The California case of *Johnson v. Calvert* suggests the kinds of attachment issues that might arise in gestational surrogacy. We do not know whether the gestational surrogate in this case, Anna Johnson, had attachment issues, and attempting to put her on the couch is futile and beside the point. But the California Supreme Court does reveal in its opinion that Johnson's relationship with the intending parents broke down in large part because Johnson "felt abandoned" by the intending parents, the Calverts, when she went into premature labor.[39] Any gestational surrogate could reasonably feel upset if the intending parents failed to provide support during a difficult time in the pregnancy. The Calverts may have behaved badly in other ways as well, including not taking the required steps to obtain insurance for Johnson. But it is the court's use of the term "abandoned" that would catch a psychoanalyst's eye. It was not just that the Calverts behaved badly, perhaps raising questions for Johnson about their suitability for parenthood. Rather their behavior apparently triggered feelings of abandonment in Johnson.

Whatever the actual circumstances in *Johnson*—and we cannot know—the case helps us to see how a gestational surrogate might feel abandoned because she naturally looks to the intending parents for emotional support. That a gestational surrogate feels so emotionally invested in a relationship with the intending parents—otherwise strangers to her—suggests that the pregnancy has mobilized strong dependency and attachment needs on the

part of the surrogate. These attachment needs could in turn lead a gestational surrogate to want to hold on to the baby, possibly in part to retaliate against the abandoning intending parents, but also possibly to alleviate dependency suffering. We might wonder whether dependency needs could lead a gestational surrogate to turn to the child for emotional gratification. Attachment to the child thus could operate as a substitute satisfaction for attachment needs unmet by the intending parents and, possibly, at a deeper level, important figures in the gestational surrogate's life. Surrogates may be motivated to breach their contracts in part to relieve their dependency suffering.

Adult attachment difficulties can be challenging to identify. Surrogacy clinics frequently rely on psychological tests such as the Minnesota Multiphasic Personality Inventory (MMPI) to rule out women with serious mental disorders. But a psychoanalyst would be concerned that this type of psychological testing, with its focus on observable symptoms, does not provide much information about the inner attachment vulnerabilities or resiliency of a prospective gestational surrogate. While individuals with serious mental disorders may be identified through MMPI testing, less salient problems, such as attachment issues, may pass through undetected. And formal psychological testing might rule out some women who are otherwise perfectly qualified to serve as gestational surrogates. More useful from a psychoanalytic perspective would be the adult attachment disorder test, called the Adult Attachment Interview, which provides reliable information about attachment difficulties.[40] And the best way to assess attachment strengths might be the simplest: clinical evaluation by a trained therapist prior to entering into the contract aimed at discovering whether an individual has developed relatively stable, long-term relationships with parents, friends, children, or romantic partners.

In addition to disruptions in the relationship with the intending parents, attachment feelings for the child might be stimulated when pregnancy provokes a developmental crisis for gestational surrogates who have not previously given birth. The view that a woman without children should not serve as a gestational surrogate is well accepted among surrogacy clinics in the United States. Most people consider childless women to be especially at

risk for errors in "affective forecasting," as behavioral legal scholars call it. These women may be less able to predict what their emotions will be when experiencing pregnancy and birth for the first time. Psychoanalysis supports the idea that a woman experiencing pregnancy for the first time may encounter unforeseen feelings. But the reasons go beyond simple lack of information, for first-time mothers may experience a developmental crisis triggered by physical and hormonal changes.

A full-term pregnancy for all first-time mothers can stimulate a profound change in a woman's sense of self and relationship to her body. While a woman entering pregnancy not intending to parent the child is less likely to experience intense developmental issues, the psychological upheaval triggered by pregnancy can prove unexpectedly destabilizing. Even when the gestational surrogate does not consciously intend to become a mother, "[e]very aspect of a woman's sense of herself is being reworked: her relationship to her body, her mind, her private spaces and inner life."[41] The gestational surrogate must surmount the challenge that all pregnant women face: "She must imagine and hold in mind [the fetus's] autonomy, distinct from her fantasies, her desires, her projections and her attributions. She must also feel secure in her own ability to retain an autonomous identity, even while surrendering her sense of self to her baby."[42] Maintaining a sense of identity separate and apart from the fetus may prove especially difficult for a woman experiencing pregnancy for the first time. A first-time mother may not be able to predict the extent to which pregnancy may upend her psychological equilibrium.

Psychoanalysis leads us to identify situations in which unconscious attachment to the developing fetus might be likely to lead a gestational surrogate to regret her decision or, more rarely but tragically, to change her mind.[43] Of course, appreciating a woman's procreational regret obviously carries risks. The United States Supreme Court has upheld some abortion restrictions on the ground that a woman may later come to regret her decision.[44] But we need not patronize women or support restrictions on abortions to conclude that gestational surrogacy is an emotionally hazardous relationship to undertake. The law can recognize this psychological reality without either essentializing pregnancy, privileging genetics, demeaning women, or denying women the choice to terminate their pregnancies. In our case, rec-

ognizing the possibility of regret does not itself lead to the conclusion that gestational surrogacy contracts should be legally unenforceable.

Psychoanalysis thus raises questions not posed by traditional legal analysis: What conflicts and ambivalences might lie beneath the calm surface of attachment desires and altruistic aims? What memories and fantasies might be stimulated by surrendering the baby? In what ways can pregnancy alter the gestational surrogate's relationship to her body and her sense of self? When might unconscious attachment longings be repressed, and under what circumstances might the repression lift? What role might anger toward the intending parents play in the gestational surrogate's experience of their relationship? As a result of psychoanalytic inquiry, legal questions reemerge for our consideration: What procedural protections should be in place to help ensure that a gestational surrogate does not change her mind and the relationship ends successfully?

A psychoanalytic perspective gives us insight into the psychological complexity of gestational surrogacy decision-making and the possible psychological vulnerabilities that might affect the arrangement. Given these complexities, a framework for rethinking gestational surrogacy laws begins to take shape. The gestational surrogate's likely resistance to knowing her own motives and ambivalence must be addressed at the outset. Money is a significant factor here. Although research shows that surrogacy is not in fact largely a case of wealthy couples exploiting poor women,[45] economic motives are still a factor for some surrogates, and in particular can play an important role in keeping attachment feelings at bay. We might assume that a gestational surrogate entering into a contract with expressly financial motives would be less likely to change her mind during pregnancy than one with more altruistic aims. But for some women, the promise of high compensation for their labor may lead them to repress attachment feelings that surface later in the pregnancy. As the pregnancy advances, the felt reality of the fetus may weaken the gestational surrogate's psychic resolve not to become emotionally attached.

In *J.F. v. D.B.*, for example, a "financially strapped" woman agreed to be a gestational surrogate for a payment of about twenty-four thousand dollars.[46] But after she gave birth prematurely to triplets, the gestational surrogate began to have concerns about the intending parents' behavior toward the

babies.[47] Contrary to her own economic interests, and presumably out of attachment feelings for the triplets, the gestational surrogate sought to breach the contract and keep the children. The Ohio Supreme Court affirmed the lower court's decision to enforce the contract and award custody of the triplets to the intending parents. The case serves as a cautionary tale about how economic motives may repress underlying ambivalence over the contract. Unconscious guilt over providing a baby for money might also play a role in upending a gestational surrogate's felt expectations for the contractual relationship. Regulation of the surrogacy process could thus include limiting compensation for the gestational surrogate's services to reasonable expenses, such as health care, insurance, and lost time from work, and perhaps some reasonable amount for the services. It is certainly not possible to identify with precision the point at which "reasonable compensation" becomes coercive for any particular woman. It may be that the best rule would be a ban on any payments beyond medical reimbursements and lost wages. This restriction will obviously disadvantage some women who would like greater compensation for their services. The paternalism of such a rule must be weighed against the harm to some women seduced by the promise of money, as well as the cost to the intending parents when a gestational surrogate changes her mind.

Counseling could be designed to inform the gestational surrogate of the enhanced risks of developing strong attachment feelings toward the child or toward the intending parents over time, although, as we saw with prenuptial agreements, counseling has its limitations. One hundred years of clinical work in psychoanalysis has yielded the bedrock principle that individuals resist recognizing unconscious facets of themselves, even when they are pointed out to them. Because individuals so strongly resist self-knowledge in the sphere of intimate human relationships, and because so much is at stake in gestational surrogacy for all concerned, careful oversight of these contracts is warranted.

Ultimately, however, psychoanalysis does not insist that surrogacy agreements go unenforced. The possibility that a gestational surrogate could attack the contract would inject great uncertainty into the arrangement, thus discouraging intending parents from entering into these agreements in the first place and disadvantaging single men, same-sex couples, and infertile individuals from becoming parents. Even minimal uncertainty about parental

rights might prompt gestational surrogates to breach their contracts, inciting more litigation. The judicial power to limit or void a contract has serious costs. Without strict enforcement, some people might not marry; others might opt not to have children. Psychoanalysis does not prevent courts and legislatures from taking account of factors beyond the subjective experience of the parties in crafting rules governing surrogacy contracts. But a balance must be reached, for there are also costs to the parties, the child, and the legal system when the emotional reality of these bargains goes unaddressed. The psychological complexities—the unconscious ambivalence, transference fantasies, dependency needs, and attachment longings—that intimate contracts involve merit special consideration when we design legal rules to govern these contracts. For these reasons, psychoanalytic insights into surrogacy decision-making should move us to close scrutiny of the process that surrounds the making of surrogacy contracts while protecting the full enforcement of contracts at their end. By better anticipating the ways in which the unconscious facets of these human relationships can affect intimate decision-making, and by policing permitted contracts accordingly, we increase the probability that these contracts will have successful outcomes.

At the broadest level, critics might argue that abandoning the free choice model with respect to prenuptial agreements and gestational surrogacy contracts potentially risks weakening the ideal of individual autonomy that informs so much of our modern liberal legal system. If we accept that unconscious ambivalence may affect our conscious decision-making, do we sacrifice the ideal of personal self-government that defines and guides our laws and legal institutions? Absolutely not. To the contrary, psychoanalysis provides a richer and more satisfying account of individual autonomy than does contract law's free choice model standing alone. In identifying the intimate contracts most likely to stimulate unconscious motives and feelings, psychoanalysis gives us a framework for understanding individual choice in a richer way. It uncovers spheres of emotional vulnerability and identifies the mechanisms by which we can address and overcome resistances to knowing. The study of intimate contracts illustrates how a psychoanalytic perspective can deepen law's conception of individual decision-making and foster meaningful choice within the sphere of family relations, and beyond.

SIX

Violent Threats

The law generally takes people at their word. For the most part, legal decision-makers presume that people mean what they say. Contracts are construed based on the objective meaning of the written words rather than by reference to the parties' subjective intent. Perhaps a party was ambivalent about the contract, perhaps she intended something else, perhaps she was operating on mistaken assumptions, but once she signs on the dotted line, the text itself controls the legal outcome regardless of any underlying doubt or dissonance. Similarly, statutes are interpreted according to their "plain meaning," whatever the legislators' actual purpose. The law of hearsay, likewise, treats words as transparent even when their context would suggest the opposite; words spoken in contemplation of imminent death, for example, are deemed especially reliable, even if the deathbed declaration expresses a final unshakable denial of the truth. As we saw in chapter 4, criminal confessions are taken at face value regardless of the psychological circumstances producing them. And because legal adjudication involves reconstructing historical events in hindsight, the finder of fact will readily assume that a defendant's earlier state of intention ("I am going to kill him") made what happened later a foreseeable certainty. For purposes of this chapter, we can refer to law's literal-mindedness as the "presumption of transparency."[1]

The law's presumption of transparency is a paradigmatic instance of the head-on conflict between law and psychoanalysis. Psychoanalysis rarely trades in literalisms. To the contrary, psychoanalysis examines words for their hidden associations, connotations, implications, and ambiguities. We might even venture to say that psychoanalysis operates using a presumption at the opposite extreme from law's presumption of transparency. *All* words and behavior have hidden, latent significance, if one just knows

where to look. Law's literalist approach, by contrast, erases fantasy, along with metaphor, irony, and humor. This fundamental difference between law and psychoanalysis appears to expose an unbridgeable chasm separating the two disciplines.

Of course irony is not so easily banished from law's domain. It was, after all, one of the law's great proponents of objectivism—Oliver Wendell Holmes Jr.—who in 1918 gave us a psychoanalytically resonant view of how language works: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[2] Indeed, it was likely because Holmes so acutely appreciated the deeper meaning of words and behavior that he turned to objective standards in law: he well understood the difficulty of knowing and proving what lies beneath the surface.[3] Following Holmes, it seems fair to say that the law relies on a presumption of transparency precisely because ascertaining what an individual really intends to communicate is beyond the reach of law's evidentiary grasp and adjudicatory powers.[4] Perhaps the evident divide between law and psychoanalysis—their conflicting presumptions of transparency and opacity—merely exposes a difference in the practical arts: psychoanalytic treatment allows for deep excavation, while courtroom adjudication clearly does not.

This chapter aims to challenge the strict dichotomy between the law's presumption of transparency and the presumption of opacity in psychoanalysis. A closer examination reveals that, despite these practical differences, psychoanalytic insight into the complexity, ambiguity, and obscurity of words has something vital to contribute to the law's treatment of verbal expression. The discussion here focuses on the law governing threats communicated to therapists but directed at third parties, the so-called *Tarasoff* rule. Here the law utilizes a presumption of transparency even on psychoanalysis's home turf in the consulting room. For therapists, as for all of us, the difficulty lies in knowing when express threats are real and when they are something else: a joke, hyperbole, a lesser aggression, or a mere turn of phrase. Yet under the *Tarasoff* rule, when a patient says to his therapist in direct and express terms, "I am going to kill him," the therapist must assume that the patient literally means what she says, and the therapist must act accordingly. In most

states a patient's express threat of harm toward a third party automatically triggers a therapist's duty to protect the potential victim. Some states have "express threat statutes," which require the therapist to take action upon hearing the explicit words. But even in states without such statutes, juries in hindsight will treat the threatening words "I am going to kill him" as transparent and hold the therapist liable for failing to act in the face of such an "obvious" expression of intent to harm. By forcing therapists to take threats at face value, the *Tarasoff* doctrine starkly illustrates the law's suppression of the more subtle, even hidden, meaning of words.

A psychoanalytic perspective helps us to see how the law's pragmatic reliance on a presumption of transparency can at times undermine the law's own foundational ideals. Laws and legal doctrines that ignore the gap between the surface meaning of words and the speaker's subjective intent can result in grave injustices: the enforcement of contracts that exploit less sophisticated parties; the failure to prosecute an abuser based on the abused partner's denial of harm; the conviction of individuals who falsely confess. In the *Tarasoff* context, the presumption of transparency leads, paradoxically, to an even greater risk of violence. Our discussion of *Tarasoff* provides a case study in how psychoanalysis can help the law to find the right interpretive balance: when to presume transparency and when to push past the surface meaning of words to buried connotations, or even to no clear meaning at all.

The *Tarasoff* Rule

In *Tarasoff v. The Regents of the University of California*, the California Supreme Court held that a therapist has a legal duty to protect an individual when a patient communicates a serious threat of physical harm to that person.[5] It is a duty to protect an innocent third party from foreseeable injury by the patient. "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."[6] In some cases, the therapist will take steps to commit the patient voluntarily or, if necessary, involuntarily.

But in many cases, the *Tarasoff* duty will require that a therapist breach the patient-therapist promise of confidentiality to warn the potential victim of possible imminent harm. If the therapist fails to warn the victim or otherwise to take steps to prevent the harm, and the harm comes about, she can be liable in money damages. Many argue that "[n]o court ruling has had a broader or more enduring impact on day-to-day mental health practice than *Tarasoff*."[7] The *Tarasoff* decision gave birth to the revolutionary legal idea that a therapist can be held liable for harm to individuals with whom she has no direct relationship.

The particularly tragic facts in the case eased the California Supreme Court's way to reaching its decision.[8] The case involved the murder of Tatiana Tarasoff, a community-college student who lived at home in a town near Berkeley, California. Tarasoff was killed by a young graduate student, Prosenjit Poddar, whom she had met in the fall of 1968. Soon after their first meeting, Poddar developed strong romantic feelings for Tarasoff, but his sentiments were not reciprocated. In January 1969, Tarasoff told Poddar that she was seeing other men and was not interested in a serious relationship. Undeterred, Poddar proposed marriage a few months later, an offer that was promptly rejected.[9] As a result of this rebuff, Poddar underwent a severe emotional crisis and depression. He apparently told his roommate that he was having thoughts of killing Tarasoff; he listened to tape recordings of conversations with Tarasoff for days at a time; and he informed coworkers that he would like to blow up Tarasoff's house.[10]

At the suggestion of his roommate, Poddar began seeing Dr. Lawrence Moore, a clinical psychologist at the University of California at Berkeley. Several weeks into the treatment, Dr. Moore diagnosed Poddar as a potentially dangerous individual suffering from paranoid schizophrenia.[11] At some point soon after, Poddar told Dr. Moore of his intent to kill Tarasoff.[12] After consulting with colleagues, Dr. Moore decided that Poddar should be committed for observation in a psychiatric hospital. He notified the police, who went to Poddar's house and interviewed him in front of his new roommate, who was also—perhaps not insignificantly—Tarasoff's brother.[13] The police concluded that Poddar was rational, and released him on the promise that he would stay away from Tarasoff.[14] No one ever warned Tarasoff or her parents

of Poddar's threats.[15] Of course, Poddar immediately stopped going to therapy. Two months later, he went to Tarasoff's home and stabbed her to death.[16] Tarasoff's parents sued Dr. Moore and others for failure to warn Tarasoff of Poddar's threat to kill her.

Few of us would disagree that had Dr. Moore really believed that Poddar intended to kill Tarasoff, he should have done *something* to intervene. And indeed, Dr. Moore did try to have Poddar committed, and the effort was unsuccessful through no fault of his own. But the California Supreme Court went much further. The court held that a therapist in Dr. Moore's position has a legal duty to protect a third party when violence specifically directed at that individual is reasonably foreseeable. The duty to protect imposes an obligation on therapists to take action whenever a reasonable therapist would foresee a serious threat of harm against an identifiable victim. These steps might include warning the potential victim. In Dr. Moore's case, the duty would have included seeking to have Poddar committed, but also might have included warning Tarasoff herself. If a reasonable therapist would have foreseen that there was a serious risk that Poddar was going to harm Tarasoff, then Dr. Moore's failure to warn her would give rise to civil liability in the form of money damages.

Many people greeted the *Tarasoff* decision as a good result. A majority of states now impose some kind of *Tarasoff* duty, although the scope of the duty varies from state to state.[17] Some states limit the duty to situations in which the victim had no prior knowledge of the patient's violent tendencies.[18] Other states expand the duty to include threats to property or to require notification of law enforcement officers as well as the victim.[19] But despite these differences, the core of the doctrine remains the same: therapists must assess the patient's risk of violence and, when serious harm is foreseeable, take steps to prevent it. The justification for the *Tarasoff* duty is self-evident. The steps taken will either restrain the patient or allow the potential victim to take steps to protect herself. If the therapist saw the harm coming, or should have seen the harm coming, and did nothing, then she will be required to compensate the victim for losses caused by the therapist's inaction. The threat of legal liability gives therapists like Dr. Moore an incentive to protect innocent people from a known threat of violence. On its

face, this system seems workable and effective, consistent with both therapeutic ends and legal justice.

Yet criticism of the decision, which began with the dissent in the case, has been strong. One of the central objections has focused on the issue of foreseeability. Justice Mosk stated the point plainly in his dissent: "[P]sychiatric predictions of violence are inherently unreliable."[20] For critics like Justice Mosk, the psychiatric profession simply does not have the kind of violence risk-assessment tools needed to ascertain with reasonable certainty whether a particular patient presents a serious threat of harm. After *Tarasoff*, many observers noted that the difficulty in predicting violence can adversely affect all aspects of the therapy.[21] Perhaps of greatest concern, the ever-present possibility of civil liability means that therapists may feel driven to overpredict the risk of violence since, in hindsight, it will always be possible for a jury to conclude that a therapist should have predicted what ultimately came to pass. The threat of civil liability may also lead some therapists to focus unduly on violent tendencies, and lead others to avoid the topic altogether. Patients may be reluctant to talk about violent feelings if they believe that doing so could lead to a breach of confidentiality.[22] Some therapists may simply stop treating this population of patients altogether. And when the therapy does go forward and violence is predicted and the warning given, the treatment is likely to come to an end, as it did in the *Tarasoff* case itself.

Express threat statutes are a response to these concerns. In these states, the *Tarasoff* duty is limited to situations in which the patient expressly threatens harm.[23] For example, California law now provides that civil liability will arise only where "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim."[24] Express threat statutes appear to resolve many of the shortcomings associated with predicting violence. As the California court of appeals described it, the express threat standard "does not compel the therapist to predict the dangerousness of a patient."[25] The therapist need only rely on the spoken word. The requirement of an express threat puts therapists on clear notice when they will be held liable for harm to third parties. Express threat statutes limit the scope of *Tarasoff*, give therapists some objective criterion

for when to act, and render the foreseeability standard more concrete. It is difficult to see what there is not to like about the rule.

One of the first cases to impose an express threat rule arose out of John Hinckley's attempt to assassinate President Reagan in 1981.[26] In the course of the assassination attempt, Hinckley seriously injured two men. The men later brought suit against Hinckley's psychiatrist for failing to take steps to confine Hinckley or to warn either his parents or the police. In this lawsuit, *Brady v. Hopper*, the Colorado federal district court concluded that it is a requirement of foreseeability that "specific threats to a readily identifiable victim" be present: "Unless a patient makes specific threats, the possibility that he may inflict injury on another is vague, speculative, and a matter of conjecture. However, *once the patient verbalizes his intentions and directs his threats to identifiable victims*, then the possibility of harm to third persons becomes foreseeable, and the therapist has a duty to protect those third persons from the threatened harm."[27]

In this passage, the *Brady* court does several things. It expresses the view that predictions of violence in the absence of express threats are "vague, speculative, and a matter of conjecture." But it also establishes that, in contexts where the patient has expressly stated violent intentions against an identifiable victim, the duty to protect arises. The court held that the plaintiffs in that case could not proceed with their lawsuit against Hinckley's psychiatrist because there were no allegations that Hinckley made any verbal threats of violence against anyone. "Human behavior is simply too unpredictable and the field of therapy presently too inexact" to impose liability absent an express threat.[28]

The express threat standard, however, does not provide a completely safe harbor for therapists because not only is an express threat necessary for therapist liability, it is alone a sufficient basis for imposing liability. A therapist *must* take steps whenever an express threat of harm is made.[29] As the Alabama Supreme Court held, "[o]nce these specific threats are verbalized, then the possibility of harm to third persons becomes foreseeable and the psychiatrist's duty arises."[30] The express threat standard is thus double-edged. On the one hand, it narrows the therapist's duty to act to those situations in which a patient expressly verbalizes a threat; on the other hand, it

expands the duty to cover situations in which a reasonable therapist might not, in her professional judgment, have believed that the patient's verbal threat was real.

Even in those states without an express threat statute, there is always a risk that judges and juries will treat express threats literally. When a patient says, "I am going to kill her," and the therapist takes no action, and the harm happens, it is almost certain that a jury in hindsight will conclude that the violence was reasonably foreseeable. In the courtroom, any competent lawyer is going to pose the obvious question to the therapist on the stand: "What was it exactly about 'I am going to kill her' that seemed ambiguous to you?" When therapists are vulnerable to a jury's *post hoc* judgment that the patient obviously meant what she said, the presumption of transparency is implicitly written into law. With the threat of liability hanging over them, therapists are not likely to ask, "What do these threats of violence mean? Do I take this patient at her word?" With or without an express threat statute, then, *Tarasoff* liability ensures that therapists hearing verbal threats will act on, rather than interpret, the words.

Interpreting Threats

A psychoanalytic perspective seems obviously at odds with *Tarasoff*'s presumption of transparency. The whole point of psychoanalytic therapy is to uncover unconscious thoughts and fantasies, to bring latent meaning to light, to probe the multiple and various associations to which spoken words lead. It is at the moment of interpretation—when any thoughtful therapist would ask herself, "Do I believe this patient when she says she is going to kill him?"—that law and psychoanalysis appear to part company. For any thoughtful psychoanalyst would know that express threats of harm might, like any other form of expression, have potentially multiple and hidden meanings. They might be relatively straightforward communications of a present intent to harm, they might be a simple cry for help, but not necessarily so.

Some critics have pushed back against interpreting express threats literally. In *Doyle v. United States*, for example, the federal district court held

that express threats made in therapy prior to a murder were by themselves not enough to establish foreseeability. "Such statements are commonly expressed to psychiatrists and merely pose but do not answer the difficult question of whether or not danger is actually present."[31] In another case, a patient, Dwayne White, had been convicted of assault with intent to kill his wife. In absolving the therapist, Dr. Brown, of responsibility, the federal court of appeals wrote:

> Dwayne White related a fantasy to Dr. Brown in which he harmed his wife with a gun. Although Dr. Brown and Dwayne White discussed this fantasy on several occasions, Dr. Brown never disclosed the fantasy to the Hospital administrators or to Genoa White. According to Dr. Brown, she did not consider the fantasy to be a threat to Genoa White because Dwayne White talked about his fantasy as a *fantasy* and he was not afraid that he would act upon it. Furthermore, Dr. Brown did not view the fantasy as presenting a real threat to Genoa White because Dwayne White had no history of assaulting women and had not assaulted anyone in recent months.[32]

In interpreting Dwayne White's words, the appellate court was sensitive to the fact that words do not always mirror intentions.

How might a psychoanalyst interpret violent words? What might these less-than-transparent meanings be? For a psychoanalyst, "I am going to kill him," spoken in the context of the therapeutic relationship, might mean many things. It might mean, for example, "I want to be rid of him," or "I want to put him out of mind," or "I'm angry at him because he has hurt me," or "I can't let anyone else have him," or "I can't let him go," or "No one else can have him," or even "I want him," or what may be most paradoxical for law, "I love him." Psychoanalysis recognizes the possibility of a deep connection between murderous rage and a controlling, all-or-nothing love. In these circumstances, the patient is likely to be unaware of how anger and aggression intersect with powerful loving longings, needs, and fantasies. The point of psychoanalytic therapy is to bring such hidden thoughts and wishes into consciousness, to help the patient get control over the more primitive

rage and aggression that dominate her conscious thinking, to help her move toward integrating loving and hating feelings in a way that helps her consolidate her ego and control her behavior. Therapists know that the verbal expression of murderous thoughts in the therapy are the first step toward containing and transforming them. When critics of *Tarasoff* assert that the legal duty to warn actually raises the risk that the patient will engage in violent behavior, they mean in part that interruptions in the therapeutic process risk pushing the patient into acting on these aggressive feelings rather than controlling them with words.

In some therapeutic relationships, particularly with severely disturbed patients or patients in intensive psychotherapy, the meaning of words might multiply and go deeper. The statement "I am going to kill her" might be an unconscious communication to the therapist, an acting out of the transference. Freud first mentioned transference in his postscript to the famous (and famously failed) Dora case. In later work, he would describe transference as "a universal phenomenon of the human mind [that] in fact dominates the whole of each person's relations to his human environment."[33] Analysts view transference as "the tendency to repeat, in a current setting, attitudes, feelings, impulses, and desires experienced or generated in early life in relation to important figures in the individual's development."[34] While to some, transference operates to distort present experience, transference in its broadest sense is what gives present reality its emotional texture and depth. Events and people have meaning for us in large part because of their resonance with the past.[35] Hans Loewald explains, "There is neither such a thing as reality nor a real relationship, without transference. Any 'real relationship' involves transfer of unconscious images to present-day objects [people]. In fact, present-day objects are objects, and thus real, in the full sense of the word . . . only to the extent to which this transference, in the sense of transformational interplay between unconscious and preconscious, is realized."[36] The more intense the feelings in a therapeutic setting, good or bad, the more likely it is that strong transference factors are in play.

In an acting out of the transference, therefore, the words communicated to the therapist might actually mean "I want to kill *you*," or "I want to kill this treatment," or "I am getting worse," or "You're not helping me," or "I

want you to stop listening and act," or "I want you to save me from my aggression," or "I want to hurt you before you hurt me," or "I'm afraid you're going to hurt me," or "I want you to love me," or again, paradoxically for those outside the room, "I love you." Attention to the transference dimension of any therapy—but especially in the context of more disturbed patients—is central to understanding the ways in which "I am going to kill her" might be a reexperiencing of early childhood conflicts with parents. It might express the patient's unconscious desire to kill off one or both of her parents in a replaying of the Oedipal love drama. The transference might bring to light the ways in which the therapist's withholding manner is reminiscent of early parental deprivation. The words may be a plea for parental love. They may be a provocation to act by a regressed patient hoping to animate an internal deadened object.

Alternatively, the therapist might understand "I am going to kill her" as a communication about the patient himself: "I want to kill her because she is hurting me," or "I want to kill off the source of my hurt," or "I am in unbearable pain," or "I must act to rid myself of the pain," or "I want to kill off part of myself," or "I want to kill myself." These deep, self-destructive wishes might show themselves only obliquely. "I am going to kill myself"—or perhaps "I am already internally dead"—emerges in a split-off and disguised form as "I am going to kill her." By killing off the love object in fantasy, the patient may be ridding himself temporarily of intolerable aggression. The words "I am going to kill her" might also signal a disintegrating sense of self, perhaps an effort to assert control over the chaotic fragmentation of a fragile inner structure or an effort to bring to life a deadened internal state. Illuminating the self-destructive rage and inner emptiness lying behind the other-directed violent words would be a goal of the therapeutic treatment and the mechanism of change.

Express threats toward someone in the patient's life might involve the transfer of feelings on yet another level. In the *Tarasoff* case, for example, unconscious feelings toward Tarasoff's brother may have fueled the intense jealousy Poddar felt toward Tarasoff. Freud explored some of the complex transference dynamics of jealousy in a 1922 paper, "Some Neurotic Mechanisms in Jealousy, Paranoia and Homosexuality."[37] Freud's inquiry brings to

our attention an aspect of the *Tarasoff* case not recognized in the commentary: Poddar's relationship to Tarasoff's brother, with whom he was living. On the one hand, we can understand Poddar's desire to room with Tarasoff's brother as a way of remaining close to her. But it is also possible that Poddar had strong, albeit repressed, feelings of love toward the brother himself. It is obviously impossible for us to know whether the brother was an unacknowledged love object for Poddar, although it is not beyond reasonable speculation to wonder whether Tarasoff's brother occupied some important place in Poddar's paranoid psychic life. Freud identified the origins of jealousy in the early brother-sister relationship, and although we do not know if Poddar had a sister, his intimate involvement in a triangular love relationship with a brother and sister suggests that complex psychological dynamics were at work.

Law's difficulty with psychoanalytic truths may run even deeper. From a psychoanalytic perspective, the issue is not simply the task of pinning down the truth of the matter in any particular situation, but rather the fact that there may be no truth of the matter there at all. Let us return for a moment to the patient's statement "I am going to kill her." We saw the interpretive process by which meaning unfolds layer after layer by way of free association. But is this process of burrowing down a kind of archeological digging, as Freud believed early in his career? Does the analytic process lead inexorably toward a greater truth, so that when "I am going to kill her" becomes "I love her," we can say with confidence, "That is what the patient *really* means"? Does the dizzying process of interpretation—the multiplicity of meanings—reflect a march toward authenticity, or is it something else?

Freud himself gives us insight into what this something else might be in his "Constructions in Analysis" paper. The analyst's task, Freud writes, "is to make out what has been forgotten from the traces which it has left behind or, more correctly, to *construct* it."[38] It appears that Freud believed that what was being constructed in a psychoanalytic treatment was historical truth. But there is a moment in his "Constructions" paper that goes further. He writes, "Quite often we do not succeed in bringing the patient to recollect what has been repressed. Instead of that, if the analysis is carried out correctly, we produce in him an assured conviction of the truth of the construction which achieves the same therapeutic result as a recaptured memory."[39] What

analysis "uncovers," Freud implies, is narrative truth rather than historical truth. But to Freud, the sense of conviction is the same whether the act remembered actually happened or not. Indeed, whether something *really* happened is not a question that many psychoanalysts ask anymore, if they ever did. Psychoanalytic "truth," to the extent anyone would use that term anymore, most often refers to narrative truth, that is, to the construction of a coherent, meaningful story through self-reflection. While not wholly unconnected from reality, narrative truth nevertheless underscores the impossibility of reducing words to some preexisting, singular, objective meaning. It is not simply that we cannot grasp the deep layers of meaning, but that true meaning does not in fact exist. Although most analysts still believe that the patient's actual history—what really happened—is relevant to the analytic process,[40] ultimately all that the therapist and patient can know is psychic truth: how these historical events are remembered, processed, and understood by the patient.[41] It may be enough if the patient believes that an event happened, if it pulls together and explains the memory traces, associations, and symptoms in the present, if it tells a story that makes sense and allows the patient to live a fuller, more meaningful life. Although law purports to establish the "true" meaning of words—whether threats were real or empty—the process of adjudicating meaning in the courtroom actually comes closer to this psychoanalytic process of narrative construction than to the objective process of validating some historical reality.[42]

What are the implications of this turn toward narrative for the *Tarasoff* standard? To the extent the standard purports to establish the patient's true intent (in this case, by a literal interpretation of the patient's words), the effort inevitably fails. Express threats might reflect a present intent to act, but they might also signify a multiplicity of unconscious meanings that defy any essential, rock-bottom wish either to harm or not to harm. It is possible that no coherent, organized intention actually exists behind the spoken words at all. The words may be expressive but not purposeful. Even buying a gun might not necessarily reflect conscious intent to harm a third party. Indeed, behavior of this sort often operates in direct opposition to conscious intent. "I couldn't help myself," "I didn't know what I was doing," "It just came upon me," "I didn't mean to do it" are all elaborations of an act carried out

with no conscious intent to do so. Patients who act out violently may simply feel an uncontrollable rage driven by unconscious aggression. As Jonathan Lear tells us, at the moment of acting out, thought may simply have broken down.[43] The therapeutic process is directed to constructing a purposeful sense of agency from these psychically unstructured thoughts and feelings.

From a contemporary narrative perspective, then, the question of when aggressive feelings are likely to result in harmful behavior cannot be answered by resort to some antecedent notion of intent. We take for granted that conscious goals precede decision-making. But from a psychoanalytic perspective, the patient must learn to become an agent of his own desires.[44] In psychoanalysis, fundamental attributes of psychic life, such as agency, intent, and desire, are the product of a successful therapeutic process rather than its antecedent condition. To return to *Tarasoff*, the patient Poddar may never have consciously intended to kill Tarasoff, he may never have made a decision to do so, he may not even have known himself that he was going to kill her until after the deed was done.

But there is yet more to be said about the complications, limitations, and dangers of interpretive transparency in law. Psychoanalysis draws our attention to the potentially devastating *counter*transference effects of the express threat standard for patients struggling with violent or aggressive feelings. Psychoanalysis shows us how the law's hermeneutic stance—its taking "I am going to kill him" literally—turns out to be a direct assault on therapists and the therapeutic relationship generally. If a therapist may herself be harmed by the patient admitting aggressive thoughts, then the words themselves become prohibited. "Don't say that," the anxious therapist might implicitly or explicitly communicate to the patient, "because then *I* might be in danger. There are some secrets that should not be divulged." *Tarasoff* requires the therapist to give a kind of *Miranda* warning to the patient: "What you say in here can and will be used against you." And the thing that cannot be talked about is the very thing most central in the therapy: murderous rage or blinding self-destructive love.

To be sure, if the analyst truly believes that the patient's violent aggression cannot be therapeutically managed, then the analyst should act. But if the analyst, in her clinical judgment, believes that the best approach is to

interpret the patient's unconscious rage and longings lying beneath the surface, then a *Tarasoff* warning may destroy the treatment. And if the patient perseveres and says the magic words anyway, then the analyst—out of fear that she might be held liable—must act. *Tarasoff* threatens to intrude on the therapeutic relationship with a destructive force; it puts the analyst directly in the role of Freud's castrating father: "If you say that to me, if you declare your love for me, I will punish you. I will end this relationship, I will destroy your hopes for a therapeutic cure, I will destroy you." The *Tarasoff* express threat standard embodies and magnifies law's punishing force. Taken to its extreme, the unstated implication of this decision, its latent meaning, is to transform the patient's aggressive "I am going to kill him" into the analyst's countertransference anxiety and fear: "If you say that, then I will have to kill you." *Tarasoff* thus reveals the hermeneutic tyranny of the legal system. In the encounter between law and psychology, law's mode of interpretation prevails. The threat of legal liability forces the analyst to take the patient at her word.

Law's literalness thus establishes the conditions giving rise to a countertransference enactment, where enactment is understood to be "a relationship phenomenon initiated by either one of the analytic dyad that at least potentially evokes the participation of the other."[45] How might the enactment play out? Most patients know that express threats of violence toward third parties are going to be met with some sort of *Tarasoff* response. In these cases, the patient might try to project her own aggressive feelings into the analyst so as to promote (in a replaying of early family relationships) a harsh, punitive countertransference response on the therapist's part. Most ominously, the countertransference response the patient may unconsciously be seeking is abandonment in the form of the termination of the relationship. Under *Tarasoff*, an express threat will set this dynamic process of punishment and abandonment into motion. When the relationship is terminated because the therapist must follow the *Tarasoff* doctrine and warn the potential victim, the patient is actually worse off, now needing to grapple by herself with the residual feelings of abandonment and punishment awakened by the therapist's "betrayal." It is thus possible that the *Tarasoff* rule could put into play a transference-countertransference interaction that

would actually raise the risk of violence by the patient.[46] In *Tarasoff* itself, for example, Dr. Moore's failed effort to commit Poddar presumably led to the termination of the therapy, possibly contributing in some way to the tragic outcome.

Yet psychoanalysis takes us even deeper. The law's intrusion into the therapeutic relationship does more than elicit a transference-countertransference enactment; it may actually serve to gratify the patient's deepest wishes in an actualization of his transference fantasies. "Actualization of the transference occurs when the patient experiences the analyst's behavior or attitude as having fulfilled his wishes or expectations, often without awareness of the wish or the process."[47] It is not simply that the law intrudes on the therapeutic relationship with a punishing force whenever aggressive feelings are threatened or expressed. The law may actually foster aggressive urges with its promise of gratifying even deeper self-punitive fantasies and desires. Nothing may feel more fulfilling to a patient in pain than emotional engagement—however punitive—by a therapist invested with transference authority. The *Tarasoff* duty may serve to seduce the patient into a transference-countertransference enactment that actualizes the patient's deepest fantasies, thus ending the therapy and leaving the patient unprotected from the anger and anguish of the failed treatment and the abandoning parental figure. The *Tarasoff* express threat standard potentially operates as a prohibition against, as well as a seduction into, violent fantasies and their punitive repercussions.

Tarasoff hardly stands alone. The punishing force of law's interpretive approach to threats is felt in other areas of the law as well. The law of child abuse illustrates the same interpretive dynamics at work. In the *In re T.K.* case, for example, the mother admitted to a social worker that she was having thoughts about harming her infant daughter.[48] Let us assume for purposes of our inquiry that this mother communicated to the social worker in the clearest possible words: "I am having thoughts of harming my baby," or even "I want to harm my baby." How should law interpret these words in the context of child neglect proceedings? Should the court intervene and remove the child on the basis of the express threat, "I want to harm her"? It simplifies the case somewhat to say that the judge did just that—he removed

the child from the mother—solely on the basis of the mother's thoughts of hurting her child. But in essence that is what the court did. The court-appointed psychiatrist acknowledged that this mother had never acted on any of her long-standing obsessive thoughts of harming herself or others. But the psychiatrist nevertheless concluded that "there is a first time for everything." Because there is a first time for everyone, we can safely assume that what distinguished this mother from the rest of us is the fact that she said the magic words, something along the lines of "I want to harm the baby."

While the legal issue here—the interpretation of a threat of harm–is similar to *Tarasoff*'s, the psychodynamics are quite different. How might an analytically inclined social worker have interpreted the words "I want to harm the baby"? It is entirely possible that hormonal changes brought about a postpartum depression in this mother that needed clinical attention from a psychiatrist. But even the most purely biological condition is accompanied by psychodynamic meaning. Why would the mother of a newborn have ideas about harming her infant? In some situations, "I want to harm my baby" might be a plea to the therapist to act: "I cannot control my frustration and rage, and I need someone to take the child from me in order to protect it." The situation indeed might call for the therapist to take steps to protect the child. But "I want to harm her" might have other meanings as well.

Most obviously, the words might express a woman's deep ambivalence about becoming a mother. The words might capture a mother's fear that she cannot take care of the baby, a paradoxical belief that it would be better to be rid of the baby than to fail. Or the words could represent a fear that she cannot protect the baby from terrible things happening, an irrational belief that she must hurt the baby herself in order to maintain control in an out-of-control world. The words might reflect despair over a threatened annihilation by an all-engulfing being dependent on her for all its needs. Or they might reflect a blurring of boundaries, a mother's deep identification with the infant's total dependency, a cry for her own needs to be taken care of, a plea to the therapist to care for her as a parent would. The words might signal the revival of older feelings toward her own parents, perhaps a recognition that she had never gotten what she needed, and an envious resentment

at being called upon to give to her child the love she never received. The words might express a mother's desire for punishment, her unconscious guilt over some unnamed deed or thoughts and her irrational fantasy that committing a criminal act will both justify and absolve her of that guilt.

So we see how a psychoanalytically minded social worker might reasonably conclude—in the exercise of his clinical judgment—that our hypothetical mother actually posed no real threat to the baby. But what happens when the social worker in his clinical judgment nevertheless gets it wrong and the mother does harm the infant? Someone on behalf of the infant will sue the social worker, arguing that the state should have protected the child from a known danger. The social worker will be put on the stand, and the lawyer will ask, "What was it, exactly, about 'I want to hurt my baby' that you didn't understand?" And so we understand why, when social workers are called upon to decide whether to remove children from their families, they are sure to take mothers at their word.

Of course, therapists and social workers hearing threats of violence against innocent third parties—especially children—must take these threats very seriously. The risk of violence may be very real. Yet attention to the underlying dynamics reminds us that the presumption of transparency has real costs. The psychic harm to children unnecessarily removed from their home can be grave and long-lasting. When removal extends for a long period of time, traumatic anxiety and fears of abandonment may ensue. Law's control over the therapeutic encounter—its ability to force therapists and social workers to act on the basis of express threats without considering the underlying psychodynamics—can impose collateral damage on the very innocent victims it claims to protect. We have seen how interpreting "I am going to kill her" as the *Tarasoff* rule may destroy therapy for many patients in need of it, including potentially the most dangerous patients. Similarly, taking "I want to harm the baby" literally means unnecessarily traumatizing some children by separating them from their primary caregivers.

The law's presumption of transparency thus has costs for patients, therapists, and innocent third parties in the context of violent threats spoken to mental health care providers. It comes into play not only with the most disturbed patients but with many less dangerous as well. It shadows every

patient's threat of suicide. Anyone can fall prey to aggressive feelings given the right circumstances. When ego restraints are loosened by external events, when a patient is deeply disturbed, or when the therapy unleashes strong transference feelings, then aggression can emerge. And when that aggression is verbally expressed, *Tarasoff* duties come into play. Therapists must take action to commit the patient, to inform the police, or to warn the victim. Psychoanalysis reveals how law's presumption of transparency informs, however subtly, every therapeutic encounter.

Psychoanalytic Ambivalence

Where does psychoanalysis's exhausting critique of *Tarasoff* leave us? If meaning is so difficult to untangle, and intentions so difficult to grasp, and violence so hard to predict, the only sensible psychoanalytic approach would seem to be ridding ourselves of *Tarasoff* liability altogether.

There may be, psychoanalytically speaking, reasons to retain *Tarasoff* liability. The *Tarasoff* doctrine may actually further the ends of therapeutic treatment by emotionally anchoring therapists as they work through a patient's raw, unmediated aggression. Clear objective guideposts for responding to violent threats—when to stay within the treatment and when to move outside—might help some therapists manage aggression when it enters the therapy. Requiring that a therapist take steps to protect third parties might also help therapists to avoid engaging in a potentially violent countertransference enactment. As we saw earlier, violent threats can be a provocation to act. A *Tarasoff* doctrine informed by psychoanalytic insights could help bolster therapist defenses against precipitously ending the treatment or otherwise abandoning the patient to her rageful impulses.

Of course, even in the absence of *Tarasoff*, psychoanalytically informed therapists would take violent threats seriously. It is true that analysts may not always take immediate steps to warn potential victims upon first hearing the threatening words. But an analyst *would* respond: sitting the patient up in a chair, scheduling additional sessions, asking questions, monitoring for signs of instability with heightened vigilance, offering supportive advice. An analyst might undertake a structured risk assessment by using objective criteria

to measure the threat of violence, including substance abuse, early childhood trauma, a history of violence, and the possession of weapons. An analyst would want to know: Does the patient have an intact capacity for empathy and guilt? What is the patient's ability to tolerate frustration and manage affects? Does the patient have a coherent, integrated sense of self, or does the self have a fragmented, brittle, or fragile quality? How developed are the patient's ego defenses? Where are the psychological points of vulnerability, and what internal and external buffers may there be? If these intratherapeutic actions and inquiries do not alleviate concerns, then an analyst *will* act to commit the patient or otherwise to avert the violence. So it is not the case that words, taken literally, never prompt an analyst to act.

Nevertheless, from a psychoanalytic perspective, the *Tarasoff* standard as it now stands does not capture what an analyst would consider essential to assessing the risk of violent behavior. Instead, the questions asked by an analyst are meant to discern a patient's risk of "acting out," that is, the risk that a patient will shift from threatening words to violent action. Under the law's presumption of transparency, words are the direct precursor to action. But in the clinical setting, words are often a substitute for action. They may in this way function as a deterrent rather than an accelerant to action, at least to the extent that the patient is engaged in the therapeutic process. Thus, to an analyst, violent words alone do not necessarily signal imminent violence. Analysts may be more concerned when *talking stops*. When words fail—when patients give concrete indications that threats are moving from words to action—then, from a psychoanalytic perspective, a therapist might herself be moved to take action outside of the therapeutic relationship to prevent harm to third parties.

The psychoanalytic concept of acting out rests on the important line between words and action, that is, the moment at which a patient's capacity to verbalize aggressive feelings breaks down and aggressively driven behavior takes over. Although the term "acting out" traditionally refers to behavior directly related to the therapy, the term is used here more broadly. The concept captures the regressive movement from mature, integrated modes of thinking toward a less rational, emotionally driven state of mind.[49] Some analysts believe that regression is a central part of analytic change. What analysts refer

to as "regression in the service of the ego" involves the careful undoing of rational thinking in order to bring unconscious desires, fantasies, and emotions to surface awareness.[50] Properly titrated, regression loosens ego defenses with the aim of freeing them from maladaptive patterns. But a malignant regression occurs when aggressive, paranoid, or other negative feelings overcome the patient's ego structure, leading to the collapse of rational thinking and, with it, the end of the therapeutic process.[51] When we refer to acting out, we mean a regression from rational, verbal thought processes to impulsive, even mindless behavior.

Acting out thus means that the patient can no longer tolerate talking about aggressive thoughts or fantasies but must take concrete steps to actualize them.[52] In its ordinary forms, acting out might appear as missing sessions, not paying therapy bills, quitting a job impulsively, or having an affair. Examples of violent forms of acting out would include the purchase of a gun or engaging in bar fights or other transgressive conduct. Acting out can also involve words, as with explosions of verbal rage. As we saw earlier, simply speaking the words "I am going to kill him" may be expressive: a test, a provocation, or a dramatic flourish. But a patient yelling "I am going to kill him" as she slams the door signals a breakdown in verbal communication. The words are more performative than expressive. To a psychoanalyst, the truly ominous signs here would be the slamming and yelling rather than the content of the words themselves. A patient's acting out might not—on the surface at least—have anything to do with a third party. For example, storming out in the middle of a session may not constitute a direct threat to an identifiable victim but would nevertheless alert an analyst to the weakening of ego constraints. Acting out always brings an end to interpretation, at least temporarily.

Is it possible to modify the *Tarasoff* doctrine to bring it into line with psychoanalytic views about acting out—this crucial moment when words move to action? Some commentators have recommended an "express act" doctrine borrowed from the criminal law of attempt.[53] But the law of attempt requires that the act be a step in the direction of committing the crime, whereas an analyst is on the lookout for *any* behavior indicating a loosening of ego controls. From a psychoanalytic perspective, the law would need to

limit therapist liability to those situations where a patient has acted out in concrete ways indicating that control over verbal aggression is failing. But even for analysts in the consulting room, this is a difficult prediction to make. For juries, the task would be nearly impossible. A jury would have to determine whether the analyst should have recognized the risk of acting out, an interpretive task of its own requiring a sophisticated sensitivity to psychoanalytic complexity. Indeed, reconstructing what really happened in the consulting room, in hindsight, is a perilous endeavor, obliging the fact finder not merely to ascertain the subjective intent beneath the literal words but to perform that interpretive task by taking account of the long, involved relationship between two people.

Ultimately *Tarasoff* liability seems impossible to reconcile with psychoanalytic truths about what actually goes on in the therapeutic relationship. It is true that *Tarasoff* liability serves some beneficial purposes: it might protect third parties, it might provide a safe harbor from liability for therapists struggling to work with potentially violent patients, and it might bolster therapist defenses against the regressive, countertransference pull of these encounters. But a psychoanalytic perspective brings to the surface the costs of *Tarasoff* liability based on the spoken word. Patients who use violent words may be unnecessarily committed, or their relationships shattered. *Tarasoff* liability may do even greater harm by discouraging those individuals who struggle with violent thoughts to seek treatment, thus *raising* the risk that these individuals will act out their feelings. The doctrine—with its inevitable reliance on the transparency of words—cannot easily incorporate a psychoanalytic understanding of when words move to action. Psychoanalytic insights into interpretive opacity, transference, regression, and acting out are likely beyond the reach of courtroom inquiry. A psychoanalytic perspective thus sensibly leads to the conclusion that *Tarasoff* liability should be abolished and therapists left free to practice their profession unburdened by fears of liability.

Our ambivalence over *Tarasoff* liability, the difficulty we have in letting it go, stems from practical concerns—How can law take into account the truths about subjective life?—but it also reflects a shared fantasy about the predictive powers of the professionals in our lives. The desire to believe that

therapists can foretell violence is fueled in part by our wish to live in a safe, ordered world with authority figures—parental substitutes—ensuring our safety. *Tarasoff* provides clarity and certainty, even reassurance, that things are what they seem: that civil liability is rational, that behavior can be predicted, and that justice has been done. We are comforted by the idea that therapists know when to act to prevent harm to us and our loved ones. And therapists themselves may be reluctant to relinquish a belief in their own powers of prediction. Our desire for safety and comfort may be fueled by even more expansive wishes concerning the criminal justice system as a whole, including the power and benevolence of judges and police. Dispelling these fantasies—delving beneath the surface desire for *Tarasoff* liability—would force us to acknowledge that we live in an uncertain, unpredictable, and sometimes dangerous world. And facing *that* truth might pose the biggest hurdle of all to achieving a just legal system.

SEVEN

Sexual Choice

The right of sexual autonomy occupies a central place in our constitutional scheme of individual liberties. The Supreme Court laid the foundation for the principle of sexual autonomy fifty years ago in *Griswold v. Connecticut* by holding that married women have the right to obtain contraceptives.[1] In *Coker v. Georgia*, the Court affirmed more broadly an individual's "privilege of choosing those with whom intimate relationships are to be established."[2] The Court's most definitive statement came in *Lawrence v. Texas*, a 2003 decision striking down Texas's ban on homosexual sodomy: "Liberty presumes an autonomy of self that includes . . . certain intimate conduct."[3] American constitutional law now appears firmly committed to the principle that "[e]very individual has the right to decide what kind of sex to have, and with what sorts of people, and in what circumstances."[4] When both parties freely choose to engage in sexual relations, the right of sexual autonomy protects the conduct from governmental interference, whatever the circumstances or character. Consensual sexual relations, including fornication, adultery, and sodomy, now presumptively lie beyond the reach of law's regulatory power.

There is, however, one long-standing law banning consensual sexual relations that remains solidly on the books in every state: the prohibition on adult incest. Forty-seven states criminally ban consensual adult incest.[5] No state allows close family members to marry, and adult incest is punished in a myriad of other contexts, such as divorce law, custody law, employment law, and immigration law.[6] Most people support these prohibitions because sex between close relatives—even adult relatives—offends their sensibilities, although moral offense as a basis for sex regulation was exactly what the Supreme Court in *Lawrence* held to be unconstitutional.[7] Defenders of the

laws also argue that incest regulations properly guard against genetic abnormalities in children, despite the fact that many other conditions pose similar or even greater risks of genetic deformity or illness.[8] As it turns out, the most convincing modern defense of the sweeping ban on adult incest is psychological: a sexual relationship with one's mother or father is unlikely to be consensual in any meaningful sense of the term. This justification of adult incest laws draws upon the idea that powerful unconscious forces deriving from the parties' close familial relationship render the "choice" to have sex a potentially tragic illusion.[9]

The subject of adult incest opens the door to a psychoanalytic perspective on the right of sexual autonomy and the modern laws regulating sexual choice. Adult incest involves sexual behavior that, on the surface, appears fully consensual. The parties themselves consciously experience the encounter as wanted. Yet experience tells us that the appearance of consent in this context may be misleading. We know that sex may be forced in ways that are hard to detect.[10] A victim may not openly resist when she is afraid for her physical safety or the safety of others. She may feel that she has no choice but to submit when the assailant is in a position of authority, such as a police officer. Sex may be coerced by means of psychological pressure, duress, coercion, or implied threats of harm. An intimate partner may procure "consent" to sex through forms of emotional control.[11] Yet in all these contexts, the lack of consent is never really in doubt, because the victim consciously knows the sex is coerced. Although a victim may (unjustly) blame himself for the assault, the subjective experience is one of force.

This chapter offers a psychoanalytic perspective on *unconscious* forms of coercion in sexual relationships. We will closely examine two adult sexual relationships raising heightened concerns about free choice: adult incest and the therapist-patient relationship. As we will see, these relationships involve forms of psychological coercion not immediately obvious even to the parties themselves at the moment of sexual contact. The sexual encounters under study here by their very nature engage unconscious psychological processes involving complex dynamics of desire and vulnerability. Obviously adult incest and therapist-patient sex are not typical, everyday sexual encounters. But understanding in close detail the unconscious dynamics in

these relationships can help us recognize less obvious forms of sexual coercion in more common sexual relationships as well.

Uncovering the psychoanalytic complexities of choice in the adult incest and therapist-patient relationships does not necessarily mean law should prohibit these relationships altogether. In other words, a psychoanalytic perspective does not overthrow law's baseline presumption of free will when it comes to sexual choice. But a psychoanalytic perspective does ensure that legal debates about sexual consent in these contexts will be psychologically informed rather than resting on unexamined assumptions about autonomous choice. Clearly the imposition of paternalistic prohibitions on sexual choice must be approached with care. Our general aversion to constraints on sexual choice reflects the law's well-established presumption that, whatever the unconscious factors affecting behavior, individuals should be treated as freely choosing actors. But concerns about paternalism are not a reason to shun psychoanalytic insights into sexual choice altogether. The failure to recognize unconscious influences on sexual choice means closing our eyes to the psychological complexity, richness, and risk inherent in all sexual encounters, leaving us more vulnerable to those situations in which sexual relations can rightly be called nonconsensual.

Adult Incest

In the 2005 case *Muth v. Frank*, an adult brother and sister married and had three children.[12] Based on their relationship, the state prosecuted them for criminal incest, and they were sentenced to eight and five years, respectively.[13] The state also moved to terminate their parental rights with respect to one of their biological children.[14] The siblings challenged the termination of their parental rights, but the federal court upheld the state statute that made incest a ground for termination, and affirmed the removal of the child. We may be uncomfortable with a legal system that visits the sins of the parents upon an innocent child. But even more fundamentally, we must question whether the parents should be treated as legal wrongdoers at all.

Freud considered the incest taboo to be a universal feature of civilized societies.[15] Anthropologists confirm its widespread existence.[16] A few countries

today do not criminalize sexual relations between consenting adult family members, but social disapproval of adult incestuous relations is almost universal.[17] In the United States, criminal laws against adult incest remain firmly entrenched in most states, with a few states allowing up to life imprisonment as the penalty for the crime.[18] Some states ban only relationships based on affinity while others ban stepfamily and adoptive relationships as well; some ban relationships between cousins while others do not; some ban only sexual intercourse while others extend the prohibition to sexual contact.[19] No state allows marriage between immediate family members. The issue of adult incest is not merely hypothetical. In 2010, a professor at Columbia University was charged with felony incest for sleeping with his twenty-four-year-old daughter over a three-year period.[20] In 1997, Kathryn Harrison published her memoir detailing her several-year adult sexual relationship with her father.[21] Persons convicted of adult incest can be fined, sentenced to prison, denied parental rights, and classified as sex offenders.[22]

Given the modern right of sexual autonomy, the ban on adult incest requires some justification. The topic provokes near universal disgust. Most people view the act as morally repugnant and unnatural, a perversion rising to the level of bestiality and cannibalism.[23] But the perversion argument should raise a red flag. Many sex acts are viewed as perversions, but we allow them precisely because we believe adult individuals have the right to control their intimate lives as long as they do not harm anyone else. In the aftermath of *Lawrence*, moral distaste cannot justify laws regulating private, consensual sexual activity.[24] Given the constitutional right of sexual autonomy, the ban on adult incest requires something more than moral opprobrium as its justification. Although we may think that the reasons for the adult incest prohibition are clear, close examination reveals surprising weaknesses.

Most people believe that incest laws are justified as health measures because they protect against offspring with genetic abnormalities.[25] Yet the scientific support for this proposition remains inconclusive.[26] Even if we accept the point as true, the argument has serious weaknesses. Many people desiring incestuous relations are not biologically able to reproduce, because of age or other reproductive impairment, but they are nevertheless included within the scope of these statutes. Same-sex couples fall within the prohibi-

tion, as do step-relatives and adoptive relatives in many states.[27] Moreover, the genetic abnormalities argument goes to the issue of procreation, not sex. Many people in nonincestuous relationships have an even greater likelihood of having children with hereditary defects, but we allow them to engage in sexual relations unrestrained. Banning all sexual relations posing heightened risks for genetic abnormalities or disease in offspring would obviously be an intolerable invasion of individual rights. The idea recalls Justice Holmes's infamous opinion in *Buck v. Bell*, in which he upheld the forced sterilization of a mentally disabled woman with the remark, "Three generations of imbeciles are enough."[28] The Supreme Court has long since abandoned support for eugenics, suggesting that individuals have a fundamental right to procreate, whatever the genetic consequences.[29]

Some might argue that allowing adult incest would make policing the incest taboo during childhood just that much harder. It is true that the possibility of sexual relations in the future might lead some adults to "jump the gun," particularly with older adolescents. But this argument could apply just as easily to all relationships with children, not just incestuous ones. The possibility of future sexual relations might lead any adult so inclined to pursue sexual relations with adolescents regardless of family ties. One might argue that adults in the family have greater access to children, and so the opportunity for developing—and the temptation to develop—sexual relations prematurely is greater. Yet whether this is true or not, we already have laws in place to address this problem, including statutory rape laws, child sexual assault laws, child abuse laws, and child endangerment laws. Statutory rape is a strict-liability crime that does not require the prosecution to prove lack of consent, so it is especially effective at deterring adult sex with minors. Child abuse laws carry heavy penalties. It is unclear why a special law banning all adult incest is needed to restrain individuals who are prone to abuse children.

A last justification for the prohibition on adult incest seems more promising, at least initially. Some argue that the possibility of adult incest will encourage adults to regard children as future sexual mates.[30] The concern here is that parents in the home would be tempted to groom their children to become their adult sexual partners. But again, child welfare laws are already in

place that criminalize conduct occurring while the child is a minor. If the argument centers on adult fantasies about future sexual relations, then this argument must explain how fantasy about the future translates into present harm when it does not result in actual sexual conduct. We should want to know more about the harms of "grooming" before imposing an absolute lifetime ban on adult incestuous relationships. Moreover, it is unclear why this argument applies only to family relationships and not to adult-child relationships outside the family. Adults may consider any child a potential future mate. Indeed it may be more likely that unrelated adults would have such thoughts and fantasies, but we do not respond by banning the eventual adult relationships. Coaches, teachers, neighbors, and camp counselors all have close contact with children, but they are not prohibited from entering into sexual relationships once the children reach the age of majority. A defense of incest laws that turns on the harm of grooming children for adult sexual relationships must explain why the harm to children is greater in families than in other contexts.

The adult-incest prohibition thus comes across, upon reflection, as an overly broad, morally discriminatory, and unnecessary intrusion on the right of sexual autonomy. We believe that incest between a parent and an adult child is wrong, but we have no convincing justification beyond moral condemnation of a parent who would pursue such a relationship. But if we focus on the moral depravity of the transgressing parent, we miss the true source of concern. Instead, by focusing on the adult child, we can consider whether incestuous relations should be banned because the adult child's capacity to truly consent to this relationship is likely to be deeply compromised. Psychoanalysis illuminates the extent to which incestuous relations throw the adult child's consent into question, therefore justifying some form of legal prohibition.

Incest has been a topic at the center of psychoanalytic thinking for over a century. Freud first became interested in incest when he observed that many of his female patients were reporting memories of childhood sexual assault by their fathers.[3] Initially he attributed their hysterical symptoms to these childhood "seductions." But he soon abandoned the seduction theory as an explanation for adult neurosis when he found himself uncovering these memories

in almost all his patients.[32] It could not be the case, Freud concluded, that actual incest was near universal. Freud's abandonment of the seduction theory allowed him to develop a framework that put incestuous longings—rather than real incest—at the center of individual development. As he moved from a theory of actual sexual trauma to a theory about the role of unconscious fantasy in psychological life, psychoanalysis proper was born.[33] To some, Freud's abandonment of the seduction theory was a denial of the true occurrence of childhood sexual abuse,[34] although Freud never in fact denied that some people suffer real abuse as children. In his *Autobiographical Study*, he clarified that "[s]eduction during childhood retained a certain share, though a humbler one, in the aetiology of the neuroses."[35] While real sexual abuse exists, Freud believed, incestuous wishes are universal.

The Oedipus complex was the name Freud gave to the child's struggle with incestuous desire. His first mention of the Oedipus complex came in a letter to a close friend, Wilhelm Fliess.[36] In Freud's view, the young boy's Oedipal desire for the mother encounters the father's more powerful prohibition on the relationship. Freud contended that a successful resolution of the Oedipus complex for boys involves renouncing the incestuous longings by internalizing the father's law, thus giving rise to the self-monitoring superego, the psychic agency charged with keeping the self morally in line. Freud argued that girls undergo a parallel renunciation of instinctual desires, although he believed that the process for women produces a weaker superego.[37] Psychoanalysts since Freud have revised his theory of the Oedipus complex in light of modern insights into gender and family roles.[38] Yet despite its shortcomings, Freud's theory of the Oedipus complex has had lasting significance as a theoretical schema—more a metaphor for the internalization of parental prohibitions than an actual developmental event—by which desire in the family is both recognized and controlled.

Psychoanalytic object relations theory has shifted attention away from Oedipal lawgiving to pre-Oedipal caregiving.[39] Focus has moved from conflict over incestuous fantasies to the earlier period of caregiver-infant attachment.[40] Sexuality still plays an important role in contemporary theory, but childhood sexual fantasies and behavior at this stage have a different meaning. Infantile longing for the parent may express a need for comfort and care rather than Oedipal

strivings.[41] While Freud focused on the young boy's libidinal desire for the mother, many psychoanalysts today would be interested in the quality of a child's early attachment to the parents. From an adult perspective, the important question to be asked might not be the classic inquiry "Did the individual successfully negotiate her murderous impulses toward her father?" but rather "Did the individual experience good-enough parental caregiving?" From a contemporary standpoint, adult incestuous desires might be the reawakening of early attachment feelings in a sexualized form. Psychoanalysts might thus disagree about whether adult incestuous relations revive Oedipal longings or early attachment needs, but in either case the adult desire draws its emotional charge from early childhood wishes and longings for physical contact with a parental figure.

The risk from adult incest is not simply that powerful Oedipal or attachment feelings will emerge, for such overwhelming emotional longings might be present in any sexual encounter. Rather, the risk is that incestuous longings toward a real parent will overwhelm the decision-making powers of the adult child. Intoxicating feelings from childhood may trigger a psychological regression to more elementary modes of thinking reminiscent of early developmental stages.[42] Not all psychoanalysts support the temporal notion of regression, in other words, the idea that thinking moves backward in time toward less developed mental processes.[43] But the phenomenon of minds shifting from "advanced" kinds of logical, integrated thinking toward more emotionally driven thought processes holds true.[44] This kind of psychic regression—in which the individual experiences a retreat to less complex forms of thinking—might render the adult child more psychically vulnerable to fantasies of physical closeness with a parent. Should this come to pass, the emotional pull of physical intimacy with a psychologically more powerful parental figure might prove irresistible. As present and past collapse, so, too, does the adult child's capacity for mature deliberative choice.

With adult incest, therefore, what looks like free consent to relations with a real parent may be an unconscious submission to the internal imagined and all-powerful parent of an earlier day. Of course, nonincestuous relationships also carry the risk of a collapse of reflective thinking through submission to a more powerful figure. But partners to nonincestuous relationships, however romantically idealized and fantasy-driven, are nevertheless better

situated to maintain the boundary between desire and reality. With incestuous relations, the imagined all-powerful parent of the past and the deeply flawed parent in the present are one and the same person. In these circumstances, the adult child faces the risk of a malignant regression involving overwhelming feelings of powerlessness and attachment. The individual may succumb to the dynamics of authority and dependency that once characterized the parent-child relationship. In situations where the incest taboo is actually violated, the loss of reality may be complete.

Some courts hold that any person who occupied a parental role in the early life of the individual falls within the scope of the incest prohibition. Thus, the Ohio Supreme Court recently interpreted the state's criminal incest laws to apply to stepparents and adult stepchildren, affirming the idea that incestuous desires flow from emotional connection rather than pure biology.[45] But biology can play a role in stimulating fantasies of emotional connection. For example, risks may arise when a biological parent who was absent during the individual's childhood reappears in adulthood. Kathryn Harrison wrote a harrowing memoir about her sexual liaison with a returning father.[46] We might assume that an absent parent is a distant figure lacking the emotional power of an actual caregiver, but in psychological terms, the absent parent can actually loom as large in a child's imagination as a parent who is present.[47] Harrison did not meet her father until she was an adult, but her book is a chilling portrait of her slow psychological and physical submission to an idealized father who returns for his daughter.[48] Fantasies in place since early childhood might, as Harrison's story suggests, render someone especially vulnerable to the seductions of an all-powerful, revenant parent.

When we consider the incest taboo, we tend to think first of the parent-child relationship. But the legal prohibition on incest extends to sibling relationships as well. Does the nature of the sibling relationship justify restrictions on sexual autonomy for consenting adult siblings as well? Should the brother and sister in *Muth v. Frank*, the case that opened this chapter, have been prosecuted and their parental rights terminated? Sibling relationships can certainly involve power dynamics stemming from an early age. Birth order, age difference, gender, physical size, and intellectual abilities all define and structure authority relationships among siblings. Siblings can even assume a parental

role, particularly in families with neglectful or abusive parents, or when a large age gap exists.[49] Like parents, siblings "often exert a definitive influence on the individual's later identifications, choice of adult love object, and the pattern of object-relating."[50] Sibling rivalry is well known, but psychoanalysts recognize a more complex developmental role for these relationships.[51] Some adults may seek love relationships that "mimic the eroticized and dependent relationship they had with older siblings."[52] High rates of sibling sexual abuse support the notion that power dynamics of a sexualized nature can be present from an early age.[53] As with incestuous relationships between a parent and an adult child, adult sibling incest risks the mobilization of these early family dynamics, particularly when one sibling assumed a position of authority—or even a parental role—with regard to younger siblings.

Nevertheless, we should be cautious about treating all adult incestuous relationships the same. Adult sibling relationships are less likely to trigger the same degree of infantile dependency or the same risk of regression as the parent-child relationship. That is not to say that adult younger siblings are never psychologically vulnerable to seductions by an older sibling. But adult siblings do not necessarily suffer from the kind of impairments in sexual choice that we see in the parent-adult child relationship. Moreover, siblings not raised together may be no more likely to succumb to unconscious pressures than anyone else. In *Muth*, for example, the brother and sister did not know each other until they met as adults.[54] In this vein, the Colorado Supreme Court has held that adoptive siblings who meet when they are adults have a right to marry.[55] Adult sibling sexual relations may offend our sensibilities, particularly when the siblings are biologically related, but they do not involve the same overpowering parent-child power differential. However imbued it may be with unconscious meaning, we must conclude that, as a legal matter, the choice should be the adult siblings' to make.

Therapist-Patient Sex

Like the incest taboo, the rule of abstinence in therapy sets limits on sexual freedom for adults. Freud early on referred to the "fundamental principle of the treatment being carried out in abstinence."[56] Therapists face serious

career-ending penalties when they violate the rule. Any sexual contact at all between a therapist and a current patient is prohibited both ethically and legally. In the psychoanalytic profession, the ban covers sexual contact between therapists and patients, both current and former, as well as family members of patients.[57] Marriage between any of these parties is also forbidden, "notwithstanding the absence of a complaint from the spouse and the legal rights of the parties."[58] While psychoanalysis has the most sweeping prohibition, all mental health professions—including psychiatry, psychology, and social work—consider sex between therapists and their current patients to be unethical, and most prohibit sex between therapists and former patients as well.[59] State laws punish therapists who engage in sex with patients through license revocation, malpractice suits, and criminal penalties.[60] The issue of therapist-patient sex can arise in other contexts as well, including civil suits for damages alleging malpractice or intentional infliction of emotional distress, and divorce litigation. Yet despite these prohibitions, patient-therapist sex still appears to happen with relative frequency. Research suggests that as many as 7 percent of male therapists and 1.5 percent of female therapists have sexual relations with their patients.[61]

What is the justification for banning sex between two consenting adults in therapy? The answer might not be as simple as it appears. Clearly, *talk* about sex is not outside the parameters of good therapy. One cannot defend the prohibition on therapist-patient sex by arguing that the topic does not belong there, for surely it does in some cases. As we will see, courts recognize that, even when sex is not the patient's presenting problem, talk about sex is a legitimate aspect of the "transference phenomenon."[62] So one cannot take the position that sex does not belong in therapy *at all*. To the contrary, discussion of sexual feelings must be allowed. We will return to this point below. For the moment, it is enough to note that the prohibition on sexual touching cannot be justified on the ground that therapy and sex are inherently incompatible domains of experience.

A more promising justification for the ban on therapist-patient sex focuses on the treatment: a sexual relationship between therapist and patient necessarily brings therapy to an end. The treatment becomes, in Freud's words, "an impossibility," in part because the aims of the treatment shift

from therapy to sex.[63] In legal terms, we could say that sex creates an insurmountable conflict of interest for the therapist, who now pursues her own aims at the expense of the patient's well-being. The therapist may be acting out narcissistic needs or delusional rescue fantasies, or she may genuinely be in love. But whatever the reason, by acting on her desire for sex, the therapist allows her interests to preempt the therapeutic goal of psychological healing, and the treatment necessarily comes to an end.

But if harm to the treatment were the only concern, then we might not be justified in imposing an absolute ban, particularly one that extends beyond the termination of the treatment. The right of sexual autonomy presumably encompasses the patient's decision to privilege sex over therapy. In the legal context, for example, a lawyer and client may terminate the professional relationship in order to pursue a sexual one. Of course, we might insist on informing the patient of the risks of terminating treatment, but—so the argument might go—the patient should then have the right to choose. And once the treatment has ended, whether prematurely or not, the right of sexual autonomy would require respecting the patient's choice. The right of sexual autonomy would seem to compel the conclusion that—however misguided the decision may be—the patient's choice to end the treatment and engage in sexual relations with the now-former therapist should stand.

A more compelling justification for the ban on therapist-patient sex rests on the documented harmful psychological effects on patients. Research indicates that the vast majority of patients suffer adverse psychological effects from sexual contact with their therapists, including an impaired ability to trust, suicidal feelings, anger, and guilt.[64] We should expect such severe consequences because most people coming into therapy already suffer from psychological ills, in some cases from the effects of early sexual abuse.[65] These documented harms arguably justify overriding the patient's choice on the ground that, once the full effects are felt, the patient inevitably will come to regret her decision. Yet while obviously compelling, this argument deserves greater attention. Many sexual acts can have serious ill effects, yet we still allow the conduct. Unprotected sex, sex with strangers, and sex while intoxicated might all risk physical or emotional harm to at least one of the parties, but we do not prohibit the activity. Individuals are sometimes

held liable if they fail to disclose HIV-positive status, but these laws also arguably raise concerns about sexual autonomy.[66] We might educate, pass out condoms, or even shame, but ultimately the right of sexual autonomy protects bad choices as well as good. Moreover, we should perhaps be concerned about rules that treat a (typically female) patient as being in need of paternalistic protection in a society with a history of denying women the right to control their own sexuality.

Which leads us to the psychoanalytic justification for the prohibition on therapist-patient sex: the sexual relationship is not fully consensual. Psychoanalysis focuses us on the therapist's misuse of power to exploit a vulnerable patient.[67] From a psychoanalytic perspective, the conduct is in fact coerced because a patient in the throes of therapy lacks full decision-making capacity. However free the patient's choice may seem on the surface, however much the patient may affirm her consent with words and behavior, however autonomous she might be in other spheres of her life, a patient in therapy is not in a position to make this choice.

Yet the reasons why the patient lacks full decision-making autonomy are not as straightforward as they first appear. Some courts argue that patients lack the capacity to consent because the therapy relationship induces deep feelings of dependency.[68] Common sense supports that conclusion. We believe that a patient is especially vulnerable by virtue of the fact that he is seeking help for mental suffering. His suffering may lead him to invest the analyst with unrealistic curative powers and authority. His vulnerability may deepen as he exposes private thoughts and feelings in the isolation of the consulting room. The ban on therapist-patient sex seems a reasonable safeguard against a therapist exploiting the patient's emotional dependency in order to gratify his own desires. Respect for the right of sexual autonomy in this context would only serve to shield the therapist's sexually predatory behavior.

Nevertheless, the assumption that emotional dependency vitiates sexual consent raises some questions. Is the therapeutic relationship really so distinctive that it requires this special paternalistic prohibition? Poverty, disability, lack of education, and sheer naïveté render many individuals sexually vulnerable, but we do not regulate their sexual choices. We treat these encounters as

consensual even when one party has exploited the economic or social vulnerability of the other in order to obtain sex. Moreover, in situations where we do regulate choice as a consequence of dependency, the risks are quite concrete: an employee cannot remove himself from the sexual advances of a supervisor without risking serious economic repercussions; a student is similarly constrained from rebuffing a professor given the risk of academic harm; an inpatient psychiatric patient confronts locked doors. In contrast, a therapy patient is not locked in the room, chained to the couch, or restrained in any way. Her job or schooling does not depend on compliance. The patient is perfectly free to walk out the door and never go back, and there will be no economic or social consequences. If she does go back and engages in sexual relations, particularly *after* the treatment has ended, it is presumably because she has chosen to do so. What makes that choice any more illusory than what takes place outside the consulting room?

Surprisingly, the courts offer a relatively sophisticated psychoanalytic explanation as to why therapist-patient sex is prohibited, one recognizing the patient's transference feelings for the therapist. The Pennsylvania Supreme Court tells us, "[T]ransference magnifies the patient's mental and emotional vulnerability; it is for that reason that some courts have held that the therapist must refrain from taking advantage of the circumstances to engage in what would otherwise be non-actionable (albeit ethically questionable) consensual sexual conduct with a patient."[69] Let us explore this transference argument as it was raised in *St. Paul Fire and Marine Insurance Company v. Love*.[70] In this case, Mary Anderson began treatment with a licensed psychologist, the aptly named Dr. Love. Mary's husband, Robert, began treatment with Dr. Love as well. Soon after, Mary and Dr. Love began a sexual affair; Robert discovered the relationship several months later. Mary and Robert then brought suit against Dr. Love for professional malpractice, among other claims. On appeal to the Minnesota Supreme Court, the issue was whether the harm to Mary resulted from the delivery of professional services or from a personal relationship unconnected to the therapy. Dr. Love argued that the relationship was a purely consensual personal relationship that fell outside of the therapy services, and—without irony—noted that he had stopped billing Mary once the affair began. Mary argued that

the sex resulted from Dr. Love's "mishandling of the transference," and thus the conduct constituted the negligent provision of professional services.[71]

The Minnesota Supreme Court ruled in Mary's favor. The court relied on the general legal rule that "a psychiatrist's mishandling the transference phenomenon during treatment and taking sexual advantage of his patient is malpractice or gross negligence."[72] Here, the court boldly entered into psychoanalytic territory. Quoting from *A Dictionary of Psychotherapy*, the court laid out the psychoanalytic theory of transference "whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly."[73] The Minnesota Supreme Court is not alone in identifying transference as central to the legal claim of therapeutic malpractice. Other courts have taken the same view, as the federal court of appeals did in *Benavidez v. United States*: "In order to manage the transference phenomenon properly a therapist must avoid emotional involvement with a patient who transfers feelings of affection to him."[74] The Ninth Circuit also confirms that "[c]ourts have uniformly regarded mishandling of transference as malpractice or gross negligence."[75] The psychoanalytic theory of transference is the core justification for holding therapists liable for having sex with their patients.

The concept of transference is one of the most important contributions that psychoanalysis has made to clinical psychology. Courts have not been blind to this fact. In an early case recognizing therapist negligence, the Missouri Supreme Court emphasized that "[t]ransference 'is perhaps regarded as the most significant concept in psychoanalytical therapy, and one of the most important discoveries of Freud.'"[76] A patient's transference experience of the therapist—as either withdrawn or comforting, or any other number of possible qualities, including caring, disappointed, interested, or angry—is not likely limited to the relationship with the therapist, and therein lies the therapeutic mission. Transference was first recognized by Freud in 1901 in the context of his failed treatment of Dora, a young woman who precipitously ended the treatment after having felt bullied—even assaulted—by Freud's sexually laden interpretations that seemed to replay the earlier sexual assaults by older men that had brought her into therapy.[77] To his

credit, Freud admitted he "did not succeed in mastering the transference in good time."[78] The Dora case remains a cautionary tale about the centrality of transference to the therapeutic enterprise and how it can go wrong.

The therapist's work with the patient's transference feelings will address the persistent emotional templates by which individuals see and experience other people and the world. Transference feelings are ubiquitous, often in ways that frustrate rather than further our conscious goals. We are compelled to find disappointment in love despite a conscious desire for romance. We are driven to outbursts of anger at work despite a conscious desire to perform well on the job. Sometimes other people in our lives are in a better position to see our destructive lifelong patterns derived from early childhood relationships. But even when these enduring feelings, beliefs, and motives that cause such trouble in our lives are pointed out to us, we have difficulty acknowledging them. We resist knowing. Our attachment to these early patterns—our ever reliable need to feel disappointment or guilt or shame—proves difficult to loosen. We unconsciously cling to our familiar view of the world, however much a burden it might be. Therapeutic treatment aims to break these lifelong difficulties by analyzing the transference patterns as they arise in the therapist-patient relationship.[79]

While transference feelings come in all varieties, they are frequently erotic. Freud first discussed the erotic transference in his early paper on transference love: "What I have in mind is the case in which a woman patient shows by unmistakable indications, or openly declares, that she has fallen in love, as any other mortal woman might, with the doctor who is analyzing her."[80] The erotic transference "refers to a patient's intense wish that the analyst respond to his erotic longings; the patient does not treat these wishes as complex expressions of his inner life but rather as urgent demands regarding current reality."[81] Freud described the centrality of this transference love to the treatment: "[I]t is an unavoidable consequence of a medical situation, like the exposure of a patient's body or the imparting of a vital secret."[82] Freud was quite clear that the analyst "must recognize that the patient's falling in love is induced by the analytic situation and is not to be attributed to the charms of his own person."[83] Contemporary psychoanalysts essentially agree. Erotic transference feelings can arise in any treatment,

no matter the gender identity or sexual orientation of the patient or therapist.

The erotic transference lies at the center of the therapeutic malpractice cases.[84] As more than one court has observed, "the basis of the malpractice claim as a therapist generally is because of a breach of the 'trust relationship' between the therapist and patient, and . . . this 'trust relationship develops because of the emotional bond that forms between a therapist and his patient, known as the transference phenomenon.'"[85] In the *Love* case, the Minnesota Supreme Court observed that "the professional services provided by a therapist require him to enter into a therapeutic alliance with the patient that invariably induces love-transference."[86] The court here recognized that the intimacy and isolation of the therapeutic setting stimulate the patient's fantasies about the therapist: "The patient, required to reveal her innermost feelings and thoughts to the therapist, develops an intense, intimate relationship with her therapist and often 'falls in love' with him."[87] Erotic transferences look consensual because the patient actively wants sexual relations. Freud described it thus: "[S]he suddenly loses all understanding of the treatment and all interest in it, and will not speak or hear about anything but her love, which she demands to have returned."[88]

The patient's demand for love is real. Properly "handling the transference" means the therapist must resist these real erotic demands.[89] For the patient, however, the desire for sex offers the false hope of instinctual gratification—a cure, in other words, that satisfies the patient's longings for love, his idealized wish that the power of romance will rescue him from darker feelings, his hope that the love of the other will finally lift his anxiety or depression. Patients may long for this without realizing that this cure through love leaves in place the underlying pathology that brought them into therapy: the aggressive, self-destructive, perhaps guilt-ridden feelings still operating below the surface of awareness, untouched by reason or insight. Properly handling the transference means keeping the patient's desire for sex a therapeutic wish rather than a therapy-destroying reality.

Remarkably, courts understand that transference is not simply evoked by the therapeutic relationship, but is actually the mechanism for psychological change. As Hans Loewald tells us, "Intellectual insight is not enough;

fruitful and effective self-understanding cannot be achieved unless the significant experiences and inner conflicts which led to the neurosis become alive again in the present and regain a measure of immediacy and urgency in the transference neurosis."[90] Although analysts of different stripes might differ in their perspectives on transference, all see transference as integral to the therapeutic process. More classical psychoanalysts like Loewald refer to "transference neurosis" to designate the specific occurrence of transference feelings toward the analyst and view the aim of treatment as working through these feelings to the point at which they no longer exert control over the patient's life. Object relations analysts might see derivatives of the representations of early interactions with caregivers in the patient's transference feelings. Modern relational analysts might emphasize the present interplay between therapist and patient more than the reliving of past experience.[91] Others might see the transference leading to the co-construction of a narrative that makes sense of a patient's past experience.[92] In a more Lacanian tradition, Julia Kristeva writes more abstractly that transference love "allows the patient tentatively to erect some kind of subjectivity, to become a subject-in-process in the symbolic order."[93] In all cases, transference lies at the center of psychic change.

The *Love* court, among others, recognized that transference forms part of the treatment proper.[94] As the court explained: "The therapist must encourage the patient to express her transferred feelings, while rejecting her erotic advances; at the same time, he must explain to the patient that her feelings are not really for him, but that she is using him in a symbolic role to react to some other significant person in her life. In short, the therapist must both encourage transference and discourage certain aspects of it. This may be difficult to do and presents an occupational risk."[95] In legal terms, proper handling of the transference means that "[t]he therapist must reject the patient's erotic overtures and explain to the patient the true origin of her feelings."[96] Thus, courts treat sexual feelings for the therapist as falling within the terrain of treatment; when sex does happen, courts consider it to be part of the professional services rather than a personal affair. As the *Love* court held, "[t]he sexual conduct, to be sure, is aberrant and unacceptable, but it is so related to the treatment contemplated" that malpractice insurance will

cover it. In finding sexual relations to be malpractice—a failure of the professional's duty of care to the patient—courts recognize that the patient's request for sex comes from within the treatment proper.

Yet understanding the erotic transference still does not pin down why the legal standard of consent is not met. How *exactly* does transference vitiate the patient's consent to sex with her therapist? Courts maintain that what extinguishes consent is the dependency resulting from the mobilization of these intense erotic feelings: "The 'transference phenomenon' refers to the tendency of patients to become emotionally dependent upon, and trusting of, their psychologist or psychiatrist."[97] But is transference dependency in the therapeutic context really so different from transference experiences in our everyday lives? If transference patterns are universal, how are we to distinguish the patient's love for the analyst from "real" romantic love, with its sometimes near-delusional transference idealizations and power imbalances stemming from various attributes of the parties, such as wealth, social status, fame, and beauty? How do we maintain this distinction when individuals set out to seduce and use all the weapons at their disposal—including deception—to win over the beloved object? Fantasy, dependency, and idealization rooted in long-standing transference patterns of relating characterize these relationships, too. We presume that transference dynamics in our love relationships enrich the bonds of affection, but this begs the question of how we distinguish what enriches from what distorts and exploits. The existence of strong erotic transference feelings does not alone suffice to differentiate the therapeutic relationship from other relationships where sexual choice operates unimpeded by law.

From a psychoanalytic perspective, what distinguishes therapeutic sex from other sexual relationships is not transference dependency per se, but rather transference feelings of a sort strong enough to distort objective, reality-based thinking. With adult incest, we saw that deliberative thinking becomes impaired as the imagined, all-powerful childhood parent merges with the sexualized parent of the present. The intensity of an erotic transference in the therapeutic setting risks a similar collapse of fantasy and reality. The patient's dependency lies in the authority structure of the early childhood relationships evoked in the transference. Freudian analysts might look

to the erotic transference as a revival of infantile longings for the parent, perhaps in resistance to psychic change; Kleinian analysts might see transference love as a defense against primitive aggression; object relations theorists might be sensitive to the erotic transference as a sexualized form of early attachment needs.

Whatever the specific theoretical orientation, all psychoanalytic schools would see the structure of treatment as stimulating the development of an eroticized transference relationship with roots in the early parent-child relationship.[98] The regressive intensity of the feelings is fueled by the intimacy, frequency, and isolation of the treatment, but also derives from a powerful combination of authority, attention, and reserve. This combination normally produces a fruitful therapeutic encounter. The therapist's abstinence allows the transference to deepen by freeing it from the constraints of the reality of the analytic relationship. With little knowledge of the therapist, the patient can fantasize freely about who the therapist might be. Therapy thus opens up the possibility for a loosening of reality through the exploration of fantasy and desire. The rule of abstinence generates this space for fantasy by allowing the patient to bring her erotic fantasies to the surface without any possibility that the therapist will respond.

This one-sidedness, where the therapist remains a relatively unknown authority figure, brings regressive pressures to bear on present-day, reality-based thinking to a point not typically reached in relationships outside therapy. In the absence of outright deception, romantic relationships always carry the possibility of reality-testing. Romantic liaisons may be intimate and even isolated, but they generally involve information sharing by both parties. When mystery deepens, questions can be asked, feelings can be verified through behavior, friends and family can be consulted. The reciprocity of the relationship with a romantic partner helps to keep the beloved person situated in the present. Of course, the relationship might be similar to or reminiscent of past relationships. But in contrast, sex between therapist and patient collapses the imagined into the real as erotic longings for a parental figure turn into an actual sexual encounter.

We are led to the psychoanalytic insight, therefore, that sex between therapist and patient constitutes a "professional form of incest."[99] When an

eroticized transference is acted on, therapist-patient sex is not *like* incest; for a patient in the throes of an erotic transference, it has the psychological meaning and effect of *actual* incest. "[W]ere a therapist to be sexual with a client it would be replicating at a symbolic level the situation in which a parent would be sexual with a child."[100] Sex between therapist and patient can constitute a transference-countertransference enactment with the devastating psychological consequences of a sexual assault, one that mirrors adult incest in its psychological operation and effect.

But as we know, the right of sexual autonomy—in this case, the patient's and therapist's rights to choose a sexual relationship with each other—requires that any prohibitions on sexual behavior be based on something more than a paternalistic concern for misguided choices, even ones with harmful psychological effects. As already noted, the right of sexual autonomy protects bad choices as well as good ones. Instead, there must be reason to think that the adult patient's decision-making capacity has been impaired in some way, in this case by the erotic transference. Freud himself said as much: the patient under the spell of an erotic transference "has become quite without insight and seems swallowed up in her love."[101] The lack of insight follows directly from the distorting effects of the therapy on the patient's powers of deliberation. The incest paradigm helps us to see how an otherwise mature adult patient may not be capable of freely consenting while in the throes of a treatment-induced erotic transference.

The erotic transference is not only an issue for the patient. Therapists too must grapple with feelings stirred up by the treatment. Some courts identify the therapist's "countertransference" feelings as the source of therapist misconduct, describing the phenomenon, not quite correctly, as being "when the therapist transfers his own problems to the patient."[102] Yet judicial understanding of the therapist's participation in the therapeutic relationship is limited. To begin with, not all courts understand countertransference correctly. In *Simmons v. United States*, for example, the federal court of appeals asserted that "[t]he proper therapeutic response [to erotic demands by the patient] is countertransference, a reaction which avoids emotional involvement and assists the patients in overcoming problems."[103] To the contrary, countertransference generally refers to the therapist's emotional involvement in the

treatment. While countertransference was once considered something to be overcome—a failure on the part of the analyst to maintain analytic neutrality—today analysts understand the therapist's feelings as part of the treatment process as well.[194] Some go so far as to argue that analysts should be expected to have strong erotic feelings toward some of their patients.[195] Whether these erotic feelings on the part of the therapist are legitimately part of the treatment proper, or a hazard of the job, their frequency confirms the importance of establishing boundaries on sexual behavior during the therapeutic treatment.[196]

Thus psychoanalysis helps us to see why the law must take seriously the absolute ban on sexual relationships during treatment, when both therapist and patient are under the sway of strong transference feelings. But what explains the ban on sex between therapists and their *former* patients? The American Psychoanalytic Association bans these sexual relationships for a lifetime, although not all the professional organizations agree. The American Psychological Association categorically bans them for a period of two years after treatment ends, thus suggesting that termination brings with it the waning of the transference intensities and distortions.[197] As transference subsides, we might reasonably assume, reason returns. Once the treatment has receded into the past, and the patient has presumably regained some distance from the therapist, why should we not respect his choice? Certainly a prohibition on sexual relations five, ten, or twenty years after treatment raises concerns about encroachments on the right of sexual autonomy. Particularly when the therapy was short-lived, we should question the denial of an adult individual's sexual choice years into the future.

Psychoanalysis helps us to see that a lifetime ban is justified by the place that a therapist holds in the patient's mind even after treatment has ended. Freud believed that therapeutic change happens by the therapist strictly adhering to the task of interpretation: once the transference neurosis was resolved by interpreting and working through the feelings, including the erotic feelings, the relationship would come to a natural termination.[198] Yet many analysts now think differently about the process of therapeutic change. In the view of some, therapy works in part by the patient internalizing the relationship with the therapist, much as a young child internalizes the

parental relationship. Different analysts might view the process of internalization in differing ways: as facilitated by the provision of a holding environment, the possibility of a new object relationship, empathic attunement, or reflective thinking.[109] But in all cases, the work with the therapist is taken in. Thus, as with an adult child encountering a returning parent, reengagement with a former therapist even years later risks reactivating the internalized parent-child configuration.

Yet despite concerns about reactivation of the transference, the paternalism of a lifetime ban may not be justified when weighed against the patient's fundamental right to sexual autonomy. Psychoanalytic fears about coercion certainly justify some temporary waiting period, perhaps even years, but a flat prohibition on sexual relations with former patients many years or decades after the treatment has ended must be carefully evaluated. In supporting a lifetime ban, psychoanalysts could be accused of undervaluing the individual's legitimate interest in sexual autonomy. At the very least, a lifetime ban needs to be justified in light of these sexual autonomy concerns. Given these competing interests—the safety of patients versus the right of sexual autonomy—a three- or four-year waiting period may be the right legal resolution. Similarly, lifetime bans on sexual relationships with any family member of a former patient would seem to unduly encroach upon the legal right to sexual autonomy protected by *Lawrence*.

The scope of the ban on sexual relations should be considered as well. Does the prohibition on sexual relations extend to less intense forms of therapy that do not aim to use the transference to bring about psychic change? Medication therapy, cognitive behavioral therapy, supportive therapy, and religious counseling do not intentionally utilize the transference as part of the treatment. Some courts have found that sexual relations in these other non-transference-based treatments do not constitute malpractice.[110] In *Bladen v. First Presbyterian Church*, for example, the Oklahoma Supreme Court held that clergy members are not liable for having sex with their parishioners because their form of counseling does not focus on transference as part of the treatment.[111] The court held: "The crucial factor in the therapist-patient relationship which leads to the imposition of legal liability for conduct which arguably is no more exploitative of a patient than sexual

involvement of a lawyer with a client, or a priest or minister with a parishioner, or a gynecologist with a patient is that lawyers, ministers and gynecologists do not offer a course of treatment and counseling predicated upon handling the transference phenomenon."[112] The *Bladen* court found that, while transference arises in many professional relationships, it is not invariably an aspect of treatment. "[P]rofessionals who do not use the transference mechanism are not subject to the same claim of counseling malpractice arising from the consensual sexual conduct of adults."[113]

Other courts have agreed, including most recently the Pennsylvania Supreme Court in *Thierfelder v. Wolfert*.[114] In 1996, David Thierfelder began treatment with Irwin Wolfert, a family practitioner. A month later his wife, Joanne, began treatment as well. Dr. Wolfert treated both David and Joanne for many years on a range of issues, including, *inter alia*, sexual problems. In addition, Dr. Wolfert treated Joanne alone for depression, anxiety, and other emotional problems. In 2002, Joanne and Dr. Wolfert began a sexual affair that lasted almost a year. Joanne became increasingly depressed and anxious. After she ended the affair, she and David filed suit against Dr. Wolfert for medical malpractice. Eventually, the Pennsylvania Supreme Court heard the case and held in favor of Dr. Wolfert. The court concluded that medical practitioners do not commit malpractice in Pennsylvania when they sleep with their patients. In the court's view, "a general practitioner is less likely than a mental health professional to recognize, understand, and employ transference as a conscious therapeutic method."[115] The *Thierfelder* decision appears to allow sex in all professional counseling relationships where transference is not the mechanism of treatment.

Yet in drawing a distinction between transference-based treatments and non-transference-based treatments, the courts misconstrue the nature of transference and its effect on the patient. Intense transference feelings might be present even when they are not the express vehicle for therapeutic change. From the perspective of a patient experiencing erotic transference feelings, the unconscious constraints on choice are no different whether the counseling was psychoanalytic or cognitive. Even when a therapist does not deliberately work with the transference, it may still appear in the treatment. All counseling relationships benefit from the patient's positive emotional attach-

ment to a more distant authority figure, whether psychiatrist, psychologist, clergy member, or family practitioner. Indeed, we should perhaps have *greater* concerns about sexual relationships in a treatment structure that stimulates strong transference emotions but does not address them directly.

The implications of transference extend beyond the counseling setting. Many other kinds of professional relationships involve intimacy, vulnerability, and counseling: divorce lawyers and their clients; medical doctors and their patients; teachers and their students. Are sexual relations to be prohibited in all these contexts as well? We must consider the possibility. Clients and medical patients may all harbor transference fantasies of an all-powerful parental figure able to rescue them not only from the practical problem at hand but also at an unconscious level from deeper feelings of unhappiness or fear. Although transference in these contexts is only incidental to other aims such as treating disease or legal counseling, it can exert a powerful influence over the parties. The American Bar Association Model Rules of Professional Conduct and many state laws prohibit sexual relations between lawyers and their current clients. While the reasons given do not expressly reference transference, the comments to the Model Rules explain that "the client's own emotional involvement renders it unlikely that the client c[an] give adequate informed consent" to the sexual relations.[116] Under the Model Rules, the prohibition does not extend beyond the termination of the professional relationship; a lawyer can cease to represent the client in order that the two may pursue a sexual relationship. The law could learn from psychoanalysis in requiring some waiting period before a lawyer is free to begin a relationship with the client. By doing so, the legal system would address psychoanalytic concerns about impaired choice while still ultimately respecting the individual's right of sexual autonomy.

As in other areas studied in this book, the laws governing sexual relations increasingly give room for individual choice. The Pennsylvania Supreme Court put it thus: "Ours is a fluid and complex society, where concepts of free will and personal responsibility hold some sway."[117] Nevertheless, while the presumption of free choice clearly underlies the right of sexual autonomy, psychoanalysis gives us guidance in modifying the scope of this right to account for relationships in which powerful erotic transference feelings

are mobilized, rendering individuals uniquely vulnerable to sexual exploitation. Psychoanalysis helps us to see how the line separating consensual from nonconsensual sex must be drawn with careful consideration for the complex psychological interplay between desire and choice. In doing so, a psychoanalytic perspective can play a crucial role in defining the range and meaning of sexual autonomy as a fundamental individual right in our constitutional culture.

EIGHT

Children's Rights

From its beginnings, psychoanalysis has been a developmental psychology.[1] Freud first studied the importance of early sexual development and then later espoused the centrality of the Oedipus complex in the unfolding of the child's psychic life. His daughter Anna Freud refined and broadened her father's theory of developmental stages. The important child analyst Melanie Klein directed her attention to the significance of earlier pre-Oedipal fantasies of an all-loving, all-hating caregiving figure. Donald Winnicott, one of the seminal object relations theorists and himself a pediatrician, wrote about how children use "transitional objects," such as blankets, to help negotiate a sense of a separate self. American ego psychologists, whose theories remain closely tied to Freud's structural model, increasingly take account of the pre-Oedipal phase of early caregiving and its implications for the later emergence of Oedipal conflicts. In their work with patients, contemporary psychoanalysts often unearth the effect of early difficulties with significant others, particularly as those difficulties manifest themselves in the analyst-patient relationship.

Psychoanalysis's developmental insights have a vital contribution to make to law's conception of children's rights. The tradition of children's rights in American law is not robust. As one children's rights scholar famously observed, "[t]he idea of children having rights is, in many ways, a revolutionary one."[2] Despite some general references to children enjoying constitutional rights, the Supreme Court has not been particularly receptive to the idea that children possess the same rights as adults, but neither has the Court embraced the idea that children have affirmative rights to care and safety based on their special status as children. Children thus exist in a kind of constitutional limbo. They are not mature enough to enjoy the

basic negative liberties possessed by adults, but—and this is the core of the concern—neither does their immaturity justify granting them affirmative rights to adult protection or caregiving. Because they lack affirmative rights to care, children's well-being turns exclusively on the resources, capacities, and inclinations of the private caregivers in their lives, usually parents.

The Supreme Court made clear its opposition to children's affirmative rights in a case with "undeniably tragic" facts.[3] Joshua DeShaney was born in 1979. His parents divorced a year later, and custody was awarded to his father, Randy. Over the next four years, many calls were made to the county Department of Social Services alerting them to suspected incidents of Joshua's abuse. Despite Joshua's trips to the hospital, the department caseworker assigned to his case failed to take any action. The Court tells us that "[t]he caseworker dutifully recorded these incidents in her files, along with her continuing suspicion that someone in the DeShaney household was physically abusing Joshua, but she did nothing more."[4] The story ends in tragedy. Randy DeShaney eventually beat four-year-old Joshua so severely that he suffered permanent brain damage, leading to his institutionalization.[5]

Joshua and his mother brought suit against the department, arguing that Joshua had been denied his right to safety under the Due Process Clause of the Constitution. His claim focused on the state's responsibility to protect him from harm at the hands of his father. In its decision rejecting the claim, the Supreme Court observed that "the Due Process Clauses generally confer no affirmative right to governmental aid, even when such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[6] The Court recognized an exception to this general rule when "the state takes a person into custody and holds him there against his will."[7] But the decision in *DeShaney* stands solidly for the proposition that children in the custody of their parents have no affirmative right to minimum guarantees of safety or security.[8]

Psychoanalysis opens up new ways of thinking about a category of children's rights arising from their unique status as children. In relying on earlier cases rejecting adults' affirmative rights to housing, food, and medical care, the Supreme Court failed to consider children's affirmative rights, *as children*. These rights are not the full panoply of adult rights to be left alone,

such as the right to freedom of speech, to free exercise of religion, or to privacy, although some older children may lay claim to autonomy rights in some circumstances. Rather, psychoanalysis underscores the importance of recognizing children's affirmative rights to state support, including, among others, rights to caregiving, to relationships with siblings, to physical and emotional safety, and to rehabilitation in the juvenile and criminal justice systems. We will call these rights *transitional rights*, that is, rights that recognize children's experience as persons in their own right as well as their experience as individuals developing along a trajectory toward adult citizenship.

Psychoanalytic insights help us to see the myriad ways in which children are not simply lesser adults suffering from limitations and incapacities, but full citizens deserving of rights deriving from their special—if only temporary—status as children. Children's special vulnerabilities, interests, capacities, and needs demarcate that status and confer on them special rights tied directly to their distinct place in the social and legal order. The psychoanalytic concepts most relevant to a theory of children's transitional rights concern capacities relating to attachment, fantasy, and psychic growth, and the interplay of these capacities with early cognitive skills. As we will see, psychoanalysis shows us that adult autonomy skills have their roots in early caregiving relationships; that fantasy, emotion, and cognition are developmentally intertwined; that the unfolding of these skills is not simply a forward trajectory but subject to regressions and developmental leaps; that children have their own unique ways of experiencing significant others and the world; and finally that children's minds and brains have a psychic flexibility that leaves them amenable to behavioral rehabilitation and psychological change. Unlike the law's current baseline rejection of children's rights, which assumes children's lack of adult decision-making skills, a psychoanalytic account of children's rights focuses on the skills and capacities that children *have*, rather than the adult capacities they *lack*. It captures the emotionally laden, developmentally anchored, interpersonally derived psychological experience of what it means to be a child on the road to becoming a mature, autonomous adult.

The psychoanalytic approach taken here illuminates how law's regulatory role differs when children are involved. The law that governs adults fits a

classic scheme of law as prohibition and discipline, one that resembles the traditional Freudian view of the lawgiving Oedipal father who controls, prohibits, and disciplines. Rights according to this view of law are understood to set limits on the state's power to regulate our lives. But contemporary psychoanalysis opens up a conception of law as playing a different, more affirmative role in children's lives. The psychoanalytic theory of children's rights presented here emphasizes the place of law in constituting rather than controlling citizens. This framework refocuses law on the task of facilitating affective relationships rather than preserving individual freedom. It invokes a pre-Oedipal model of "good-enough" caregiving that stresses special transitional rights rather than autonomy rights. Transitional rights include those positive entitlements—to maintain relationships with adults and other children, to safety in the home and school, and to rehabilitation in the criminal justice system—tied to children's status as children. To the extent a psychoanalytic account of children's transitional rights reveals the importance of early emotional relationships to the unfolding of mature autonomy, we discover a relational, constitutive, affirmative role for rights in our constitutional system.

The Incapacities Framework

The conception of children in American law has changed over the centuries. At common law, children over the age of seven were often treated like miniature adults.[9] Nineteenth-century reformers introduced the idea of children as innocent, dependent beings different from adults and in need of special solicitude, protection, and education. In the late nineteenth and early twentieth centuries, this paternalistic attitude toward children brought more humane labor, juvenile justice, and child welfare laws, as well as compulsory education laws.[10] It also increasingly emphasized parental rights and obligations relating to the care and upbringing of children.[11] Yet this more sympathetic view of children as innocent dependents did not usher in an era of children's rights. The concept of children's dependency reinforced the idea that children were not autonomous beings capable of effectively exercising rights.[12] Children did have certain basic liberties as persons under the Constitution, such as the right under the Thirteenth Amendment not to

be enslaved or the right under the Due Process Clause not to be deprived arbitrarily of life. Nevertheless, the existence of a few fundamental rights for children did not negate the fact that, well into the twentieth century, children enjoyed—at best—only a minimal set of entitlements associated with basic liberties.

Serious debate over children's rights arose during the modern civil rights era.[13] Advocates for children drew parallels between children's legal disabilities and the disadvantaged legal status of African Americans and women. During this same time, the Supreme Court became more favorably disposed toward recognizing autonomy rights for children, including a limited right to free expression in school, some procedural rights in the juvenile justice system, and a modified right to obtain an abortion under *Roe v. Wade*.[14] Yet despite some successes, the children's rights movement never fully materialized, and the United States today is the only member state of the United Nations not to have ratified the Convention on the Rights of the Child. Critics of children's rights span the political spectrum. Conservative critics worry that children's rights will undermine parental authority, while liberal critics have concerns that rights will justify state intervention into the family and possibly undercut children's welfare claims.

But a major obstacle to children's rights is the widespread legal view that rights and children are inherently, by definition, incompatible. The argument rests on the traditional view that autonomy is a precondition to possessing rights, and children, by definition, lack autonomy. "The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."[15] This conception of autonomy is linked to many of the most important rights in a liberal state, including the right to vote, to freedom of speech and association, and to personal liberty in matters relating to marriage, reproduction, and child-rearing. "The presumptions arising from the limited capacities of minors account in large part for the general limitation on their exercise of rights in the 'choice' category, because the law assumes . . . that a basic capacity to make responsible choices is a prerequisite to the meaningful exercise of those rights."[16] Because law treats decision-making autonomy as a prerequisite to rights, children are presumptively excluded from the class of

rights holders.[17] "Since children, at least infants, lack the capacities requisite for autonomy on which the very concept of a right is allegedly predicated, it makes no sense, however well-intentioned this might be, to ascribe rights to children."[18] Rights require autonomy, which—so the argument goes—children lack.

One need not look far to see that our legal system denies children basic autonomy rights. By law, children do not have the fundamental rights to vote, to marry, to work, to make health care decisions, to have sex, to travel, to refuse an education, to be on the streets at night, to speak publicly in defiance of parental restrictions, to purchase pornography, to attend (or not to attend) religious services against parental wishes, or to claim practically any other freedom enjoyed by adults. As the Supreme Court repeatedly notes, "[e]xamples of this distinction [between adults and children] abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and hold office."[19] Because they are presumed to lack adult autonomous decision-making skills, children are not treated as full citizens entitled to lead lives of their own choosing. Far from being let alone, children are forcefully subjected to relationships, activities, instruction, and ways of life not of their own choosing and backed up by the power of parents and the state.

The incapacities view has been relaxed somewhat in recent decades, but not in ways that have dramatically altered the essential rights-denying framework. In the late 1960s, the Supreme Court confirmed that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[20] The seminal cases recognizing rights for children are *In re Gault* and *Tinker v. Des Moines Independent Community School District*, which held, respectively, that children have adult constitutional rights for purposes of juvenile proceedings and speech in school.[21] Yet despite some language suggesting that children broadly enjoy constitutional rights, children's autonomy rights are in fact relatively few and far between, and generally remain qualified. For example, children have free speech rights in school only as long as the speech does not disrupt the learning environment.[22] They have the right to terminate a pregnancy but subject to parental or judicial oversight.[23] In a few cases, the Court has recognized children's special rights based on their

decisional incapacity: the right not to be executed or to serve a mandatory life sentence, the right not to be subject to religious coercion in elementary and secondary school, and the right to have a neutral decision-maker determine involuntary confinement in a mental hospital.[24] These rights based on children's incapacities serve as isolated exceptions to the general rule that children's incapacities are rights-impairing.

The Supreme Court has expressed a version of the incapacities thesis in many cases over the past few decades. In 1979, Chief Justice Burger, speaking for a unanimous Supreme Court, observed that "the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[25] A decade earlier, in *Ginsberg v. New York*, the Court upheld a state law prohibiting the sale of pornography to minors on the ground that "a child may not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read."[26] Justice Stewart wrote in concurrence: "[At] least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults."[27]

In *Bellotti v. Baird*, the Court recognized the right of mature adolescent girls to choose whether to terminate a pregnancy, while nevertheless expressing "concern over the inability of children to make mature choices."[28] As the Court emphasized, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[29] Accordingly, "the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice."[30] While the traditional incapacities thesis is self-evident with regard to young children, the Supreme Court has been explicit that it applies to older children as well. The Court thus asserted in *Parham v. J.R.* that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions."[31] In death penalty cases involving older children, the Court has

recognized "[minors'] inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives."[32] In the Court's view, even these older children are not yet "fully rational, choosing agent[s]."[33] The incapacities thesis is reflected in a long line of cases questioning the autonomous decision-making power of children. Again and again, the Court has emphasized that, in Justice Stewart's words, the child "is not possessed of that full capacity for individual choice."[34]

The theory that children do not possess most adult rights because they lack autonomous decision-making skills is fortified by the existence of a robust constitutional doctrine of parental rights. Since the early 1920s, parents have enjoyed broad constitutional rights to the care and custody of their children. In case after case, the Supreme Court has afforded parents the constitutional right "to direct the upbringing and education of children under their control."[35] Indeed, as the Court has observed, "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[36] The plurality in *Thompson v. Oklahoma* explained it thus: "[P]aternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life."[37] In many cases, the Court has emphasized that "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions."[38] The Court's enthusiasm for parental rights thus draws from the incapacities view. For children deemed too immature to make decisions on their own behalf, the traditional incapacities framework—which posits no rights for children and broad parental authority—applies.

The incapacities framework has obvious intuitive appeal.[39] Children, particularly very young children, do lack the physical, psychological, and moral capacities needed to live an autonomous life, however defined. Children start out utterly dependent on caregivers, and only slowly acquire the full range of skills needed to make independent, mature choices. Yet the problem with the incapacities framework is not the idea that children lack autonomy. Rather the incapacities approach assumes that children's lack of

autonomy means that they have no rights. It fails to recognize that there is an alternative basis for awarding children rights based on children's special capacities, interests, and needs. The rights-denying incapacities approach measures children against an adult standard rather than seeing children in their own right. Children may lack autonomy, at least younger children, but they possess a broad range of skills and attributes, some of them vastly superior to those possessed by adults: children have strikingly well-developed capacities for emotional attachment, fantasy, cognitive thinking, relating to others, and psychic change. While the incapacities approach measures children in relation to an adult norm, a different picture emerges when we focus on children as distinct individuals in their own right.

The possibility of affirmative rights unique to children has not entirely escaped the attention of the Supreme Court. Children's right to education is a familiar example. In *West Virginia State Board of Education v. Barnette*, the Court affirmed the state's educational mission of "educating the young for citizenship,"[40] and a decade later, in *Brown v. Board of Education*, the Court sounded that same theme.[41] In *Plyler v. Doe*, the Court clarified that public education "[is not] some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[42] And in *In re Gault*, the Supreme Court suggested that children have a fundamental right to custody: "The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.' He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any [liberty] rights, because he has none. It merely provides the 'custody' to which the child is entitled."[43] Writing for the majority in the 1984 case of *Schall v. Martin*, Justice Rehnquist endorsed the "right to custody" argument. In upholding the practice of juvenile pretrial detention, he wrote, "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, *the State must play its part*."[44]

A psychoanalytic perspective builds on these Supreme Court cases relating to children's education and custody by giving us a picture of children's

unique psychological capacities. Psychoanalytic views on development are complex and multifaceted, but what follows is a broad overview of some of the core clinical and theoretical ideas that serve as a foundation for a new framework of children's transitional rights.

Psychoanalytic Views on Development

Almost all contemporary psychoanalysts view early childhood experience as central to an individual's psychic structure, sense of self, and ways of being in the world. Freud highlighted the developmental significance of the Oedipal relationship between child and parents. He famously conceived of the child in tragic terms, born into a state of instinctual conflict that even the most fortunate individual would spend a lifetime trying to manage. In the Freudian view, "[t]here is no escape from human weakness, aggression, and destructiveness, and life is a constant struggle against the reactivation of infantile conflicts."[45] One of Freud's most famous followers, Melanie Klein, shifted attention to the earlier pre-Oedipal period of caregiving, although she retained Freud's drama of love and aggression as it played out in the mind of the infant.[46]

Like Klein, modern object relations theorists focus on the importance of the earlier pre-Oedipal period of infant caregiving, and in so doing so they tend to emphasize the more affirming, loving dimensions of attachment to a maternal figure.[47] This view of the "good-enough" caregiver-infant relationship "is undoubtedly more optimistic, seeing man as full of potential and the infant as ready to actualize his destiny."[48] The shift from classical Freudian ego psychology to modern object relations psychology signals an evolution in the basic framework of child development from the formative influence of the prohibiting, disciplining law of the father to the earlier nurturing, constitutive love of maternal caregiving. One might say that contemporary psychoanalysis centers no longer on the tragedy of instinctual conflict but instead on the solace of pre-Oedipal love.

While not the only important psychoanalytic thinker to focus on early attachment, Donald Winnicott offers a perspective on child development especially helpful to understanding the child's trajectory from infancy to adult

autonomy. How an individual with a sense of an autonomous self (or relatively autonomous self) comes into existence is a major focus of his work.[49] Winnicott emphasizes the developmental importance of the relational matrix of caregiver-infant.[50] As he famously put it, "There is no such thing as a baby," meaning that any understanding of infant development must include the parent-child dyad.[51] In Winnicott's view, "good enough" caregiving is central to the development of a sense of an integrated, differentiated self.[52] A good-enough caregiving environment is one that provides a relatively stable, continuous, emotionally responsive relationship between child and adult.

The implications of the good-enough caregiving relationship for children's development are profound. For example, good-enough caregiving helps to integrate the chaotic stream of incoming sensory experiences. Parental care "[makes] it possible for the infant self to be enriched, as opposed to overwhelmed, by instinctual experience."[53] As Winnicott described, the infant does not at first distinguish between self and other; from the infant's perspective, self and world are one. But the relationship with a caregiver does not stay entirely gratifying for long. Most object relations theorists concur that periodic frustration of wishes "brings to [the child's] awareness the painful absence of the fulfilling objects and thus contributes to differentiate self from non-self."[54] This process of self-differentiation entails the building up of psychic structure from the memories of countless interactions with the caregiver. Self-differentiation turns on the internalization of these mostly gratifying but sometimes frustrating caregiving interactions. From an object relations perspective, then, the development of psychic structure—a differentiated, integrated, internal representational world—emerges out of the early caregiver-child matrix.[55] "All psychological experience, from the most fleeting fantasy to the most stable structure, is organized by object relations."[56]

As the interactions with caregivers are experienced and internalized, the child acquires higher-order capacities for differentiation between self and other, integration of affects, psychic constancy, and self-reflection. Psychoanalysts "agree that internalization of objects and interactions with objects contributes [*sic*] to the organization of mental life and the development of mental structure."[57] Over time, psychic structures become stabilized but are also always changing, subject to both disintegration and consolidation as

the infant matures along a developmental trajectory to adulthood.[58] The child's increasingly structured mind acquires a sense of agency that helps her to control impulses rather than act on them. Early attachment relationships give the child the tools to discipline drives; to integrate disparate memories, feelings, and beliefs; and to tolerate and regulate affects. At its best, then, the child's capacity for attachment as actualized by good-enough caregiving gives rise to a level of self constancy that serves a synthesizing, integrating function and ultimately makes the more advanced capacity for conscious, reasoned decision-making possible.[59]

Psychoanalysis is hardly alone in recognizing the importance of early caregiving in child development. John Bowlby—the father of attachment theory—began his career as a psychoanalyst but eventually broke from the field to focus his attention on infant behavior.[60] Research in developmental neuroscience also confirms the importance of early attachment.[61] Neuroscientists have established that early childhood experience can change the structure of the brain.[62] Secure attachment to a responsive caregiver provides an important buffer against stressful stimuli in young children, a fact documented by both behavioral research and developmental neuroscientists.[63] Unresponsive or aversive care can cause overstimulation of the neurobiological stress systems, while conversely responsive care can protect against environmental adversity.[64] Epidemiological research provides data regarding the long-term effects of early childhood experience that supports the neuroscientific research.[65] Science is now validating many long-standing psychoanalytic ideas about early attachment and its place in child development.

Psychoanalysis teaches us that children's early attachment to good-enough caregivers also implicates the capacity for fantasy, a psychic skill at which infants and children excel.[66] Early on in the life of the child, fantasy serves attachment needs by facilitating the internalization of early caregiving relationships. While psychoanalytic theorists might disagree over the extent to which internal object relations represent actual caregiving relationships, all would agree that fantasized representations in the mind build up over time from the countless memories of interactions with the caregiver. For example, a young child uses fantasy to conjure up the caregiving relationship in order to soothe herself in the caregiver's absence. As the child

grows, a more sophisticated kind of fantasy play becomes one of the primary mechanisms by which the child learns to negotiate the increasingly complex relationship between self and other. As Winnicott explained, transitional objects such as dolls, toy trucks, blankets, and even imaginary friends exist in the space between internal fantasy and external reality; they represent a "developmental way station between hallucinatory omnipotence and the recognition of objective reality."[67] The transitional object "serve[s] as a psychic organizer for the process of separation-individuation; it delineates a boundary between the self and the world; and it aids in the creation of a body image."[68] While transitional objects play a large role in the fantasy life of young children, we also see them operating in literature, theater, art—all activities that suspend reality-based thinking and enrich adult experience.

Winnicott's theory of transitional space captures the role of fantasy in helping a child negotiate relationships with real people, as paradoxical as that might seem. Fantasy play with caregivers helps the child to begin to develop what psychologists call "mentalization" capacities, in other words, the capacity for knowing that other people have minds separate from her own. What goes on in other people's minds is essential to understanding other people and their motivations.[69] The failure to develop strong mentalization capacities can have serious psychological consequences, leaving the child with "a world of inadequately formed representations, thereby undermining self-object differentiation, separation-individuation, reality testing, [rational] thinking, affect regulation, empathy, and deeper understanding of social interaction."[70] The skills of mentalization are thus the foundation for mature decision-making later in life. We ask: What is he thinking? What did she mean to imply? Does he love me? In this way, paradoxically, imagination helps children to acquire a reality-based perception of the world. As developmental scientists put it, the emergence of play in young children is "linked with a move toward objectivity rather than away from it."[71]

Children's capacity for fantasy undergirds their ability to deliberate rationally, not just as protoadults but as self-reflective thinkers in their own right. Some describe children as young philosophers with the well-developed capacity to think counterfactually.[72] Children "may be more free, open, inquisitive, and, yes, philosophical thinkers than they will ever be when they

grow up."[73] Their inclination to reason counterfactually makes perfect sense given their powerful skills of imagination. While some developmental psychologists might view children's moral and religious views as unformed, theologians have recognized children's enhanced spirituality,[74] perhaps rooted in children's ability to engage in "magical thinking" unchecked by the rules of rationality and logic.[75]

Children's capacities for attachment and fantasy intersect with the mind's powers of cognition. Cognitive learning begins with the earliest language acquisition, followed by the development of higher-order cognitive capacities for reality-testing, reasoning, and abstract rational thought.[76] The early caregiving environment contributes to the development of these skills. Neuroscientific research now confirms that "the first few years of life are crucial for cognitive development and that early experiences can influence the emerging architecture of the brain."[77] Deepening this scientific picture, psychoanalysis teaches that the unfolding capacity for rational, logical thought does not exist separate from the affective ego structures built around internalized objects. At the most basic level, "language is typically first conveyed to the child by the parental voice and in an all pervasive way by the mother in the feeding situation and in all her other ministrations to the infant."[78] Developmental neuroscience also reports data showing that "language learning is one of many behavioral systems whose development is altered—neurobiologically and behaviorally—by caregiving experience."[79] Through responsive attention, the caregiver helps the child integrate unstructured imaginings and feelings into higher-order cognitive thought processes—what psychoanalysts call secondary process.

The interplay between cognition, on the one hand, and imagination and emotion, on the other, unfolds in even more complex ways as the child grows. Psychoanalysts study how the child's cognitive capacities increasingly mediate intense affects, such as love, hate, guilt, anger, shame, and fear, thus limiting the distorting effects of affective storms on rational thought and the blurring of lines between fantasy and reality. And the inverse is true as well: cognition helps to structure fantasy and facilitates a consistent sense of self and other people; therapeutic treatment shows that cognitive self-reflection can serve to strengthen or repair a disintegrated or fragmented

self. Cognition also plays a central role in guiding the child's interactions with caregivers and adaptation to the external world.[80]

As actualized within a good-enough caregiving environment, therefore, the child's striking capacities for attachment, fantasy, and cognitive thinking shape his or her sense of self, lived experience, and developmental trajectory. Of course, an acknowledgment of the centrality of early childhood experience and the caregiving environment should not eclipse the importance of innate constitutional factors to the child's development. As Freud cautioned, "we must give up the unfruitful contrast between external and internal factors, between experience and constitution."[81] In a complex dynamic between nature and nurture, a child's innate constitutional factors—a sunny disposition or anxious outlook—will affect how caregivers respond. Children with differing dispositions will often elicit different responses from caregivers: a shy baby may evoke a less engaged response from a parent than an outgoing baby. Environment can thus itself be shaped by the child's innate physiological-affective-cognitive traits.[82] In any particular case, of course, it is impossible to predict how the specific confluence of biology and environment will play out in the long run for the individual. In some cases, it may be possible to trace adult psychopathology back to childhood disturbances, but attempts to predict adult outcomes *ex ante* are impossible.[83] Constitutional resilience, ameliorating circumstances, substitute caregiving figures, siblings, and peers might all serve to correct for deficiencies in the early caregiving environment.[84]

Finally, as a clinical treatment, psychoanalysis posits the essential plasticity of human minds, and children's minds in particular. Patients do not simply adapt to their problems or overcome symptoms, but ideally experience a change in their character or orientation to the world, what psychoanalysts refer to as "structural change." Developmental neuroscience confirms the astonishing "neuroplasticity" of children's brains, that is, the way experience can alter brain structure and functioning.[85] This neuroplasticity is evidenced in the efficacy of targeted intervention programs, such as those providing intensive intervention services to foster care children. One study of three-to-six-year-old foster care children showed that intervention measurably improved the children's physiological stress tolerance.[86] With their shared

focus on the importance of early attachment as well as the possibility for change, both psychoanalysis and neuroscience balance "an appreciation of the potentially enduring effects of early influences with an awareness of the flexibility of systems."[54] Early experience matters, but not irrevocably so.

For law, several aspects of this complex psychoanalytic developmental picture stand out. The most important insight psychoanalysis brings to law is that the skills of adult autonomous reasoned choice—the skills needed to live a life of one's own choosing—derive from children's earliest *relationships* with caregivers. We learn from psychoanalysis that what the law values as "autonomy" paradoxically arises from and implicates our closest attachment relationships. Margaret Mahler put it slightly differently in observing that the emergence of a sense of individuality requires giving up a gratifying closeness with the caregiver.[55] Capacities for attachment, fantasy, and cognition—as actualized in the early caregiving relationship—unfold in dynamic relationship to one another over time, with transitions, regressions, and developmental leaps tied to internal and external experiences, eventually giving rise to higher-order processes, such as emotional self-mastery, secure reality-testing, and internal object constancy. Psychoanalytic insights into children's developing capacities draw our attention to children's complex, rich, fantasy-laden, changing, and relational internal worlds.

A psychoanalytic perspective on children's development gives us a new conceptual framework for thinking about children's unique capacities, present experiences, and future autonomy interests. We learn from psychoanalysis that children are not just unformed adults lacking in mature decision-making skills. Instead, psychoanalysis brings to our attention the skills and capacities children have rather than those they lack. Children possess exceptional capacities for relating, for fantasy, and for psychic change that define their development and experience as children. A framework based around children's capacities—who they are rather than who they are not—allows us to develop a theory of children's rights as transitional, that is, rights that both reflect and foster children's unique yet ultimately temporary status as children.

Transitional Rights

Transitional rights are oriented around both children's interests as children and their interests as developing individuals on their way to becoming adult citizens. These rights are transitional in two senses: they are dynamic, not static, adapting to children's evolving capacities and circumstances, and they terminate upon reaching the relevant age of majority. Transitional rights do not rule out the recognition of some adult rights for older adolescents, although, as we saw earlier, most of these rights are transitional as well, that is, modified to fit children's specific capacities and circumstances. The notion of transitional rights brings new conceptual clarity to the special rights that children currently enjoy and lays a vision for those rights children *should* enjoy under our Constitution. Rights do not only operate here to protect the child against coercive state action; they operate to support and facilitate the child's present experience and development into an autonomous adult and citizen.

It is worth pausing to reflect on the fact that rights held by adults are rarely—if ever—transitional. They are almost always static, in other words, not tailored to or conditioned on any particular age or set of skills. Yet adulthood does not mean the end of development. Since Erik Erikson set out his theory of development across the life span, psychoanalysts have explored the developmental stages of young adulthood, middle age, and old age, culminating with the task of coming to terms with the loss of youth and impending mortality.[89] Stephen Mitchell describes "the tension between autonomy and surrender throughout the life cycle."[90] Adults as well as children confront developmental tasks and transitions. The framework of children's transitional rights thus opens up inquiry into the possible recognition of adult transitional rights, particularly those belonging to old age. It raises the question of whether some adult rights encompass not only a guarantee of negative liberty but some affirmative set of entitlements. For our purposes here, however, the task is to elaborate a theory of *children's* transitional rights.

For very young children, transitional rights center on the caregiving relationship. At present, the incapacities framework relies on the basic default rule that parents have the fundamental right to control the care and upbringing of their children without interference by the state or other individuals.[91]

Yet the default rule of parental authority has two major deleterious effects. First, as many scholars have observed, the current approach fails to recognize children's independent interest in maintaining primary caregiving relationships with nonparental figures, such as other relatives, foster parents, and stepparents.[92] The Supreme Court has made it clear that foster parents and other nonparental caregiving figures have no rights to a relationship with a child, nor do children themselves have an independent right to maintain these nonparental relationships.[93] Yet in some cases, children's primary attachment relationship will not be to a biological parent. As the authors of the pathbreaking book *Beyond the Best Interests of the Child* first laid out, a psychoanalytic framework supports recognition of the child's legal interest in these alternative attachment relationships.[94] In some cases, the child's right to maintain a relationship with these nonparental figures may mean recognizing legal ties over the objections of a biological parent.[95] Rather than a negative right to be free from state intervention in their relationships, children have affirmative rights to relationships with the primary attachment figures in their lives.

Second, transitional rights encompass the child's right to support from the state when good-enough caregiving is at risk. As discussed earlier, the Supreme Court made it clear in *DeShaney* that, under prevailing norms, the state owes children no affirmative duties. If parents are unable to provide basic necessities, then the state has the duty to help them by providing welfare payments, childcare services, early education, or flexible work hours. Yet even when parents have forfeited their rights, whether through neglect or abuse, children have interests in maintaining the attachment relationship. Child welfare policies that emphasize removal over family preservation arguably infringe on the child's right to maintain relationships with attachment figures, however flawed they may be.[96] Attachment interests may exist even when a child is at risk.[97] Children's transitional right to caregiving relationships puts the burden squarely on the state to provide support for these children before removal from their parents takes place. State action to protect children should keep children with their primary caregivers whenever possible, and prevention strategies should be put in place. The facts in *DeShaney* remind us of the risks of keeping children with abusive

parents, but the risks of removal are also great. Ultimately, children's transitional rights require that the state devote resources to getting the removal decision exactly right.

Children's transitional rights encompass other rights in the family, including the right to maintain relationships with siblings. Although the most important early attachment relationships are usually with caregivers, siblings nevertheless play an important role, both as peers and sometimes as surrogate caregivers.[98] Relationships with siblings, invested with attachment and rivalry feelings, loom large in the child's internal life, and disruptions in these relationships—often outside the child's understanding—can have long-term consequences for the child's well-being. The definition of who counts as a sibling can include stepsiblings and foster care siblings, who may occupy a role similar to biological siblings in a child's world. While the sibling relationship is multifaceted, "these relationships offer their own psychological benefits, including the potential for ameliorating the deficiencies and disturbances in the child-parent relationship."[99] A child's right to maintain sibling relationships arises in many contexts, but particularly in child custody, removal, foster care, adoption, and immigration proceedings.

Another transitional right in the home concerns the child's interest in being free from corporal punishment. The traditional incapacities approach treats the issue of corporal punishment as a question of parental prerogative to exercise reasonable physical discipline. This approach, with its emphasis on parental authority, does set limits on discipline but leaves unanswered fundamental questions: Is corporal punishment in the form of spanking, grabbing, or hitting ever justified by the child's developmental needs and safety? How might the legal standard for reasonable punishment change as the child grows older? A psychoanalytic perspective raises additional questions, suggesting greater restraints on parental disciplinary authority. Psychoanalysis draws our attention to the ways in which corporal punishment of very young children might instill in the child a belief that she is a bad person rather than an understanding of consequences for bad behavior. If severe enough, corporal punishment of young children by a primary caregiver might collapse the transitional space between fantasy and reality, destroying the child's capacity for fantasized play with a benevolent, good-enough caregiver. Once that

happens, cascading implications for the child's sense of self and perception of the real world might ensue. Corporal punishment raises the risk that the young child will internalize relationships in which love and violence intersect, setting the child up for adult relationships with this same configuration. These psychoanalytic concerns undergird the recognition of children's transitional right to be free from corporal punishment inside the home.

Attention to children's differing capacities and developmental interests does not rule out conferring on children adult rights as well. Ironically, the case for granting some adult rights to children may be even stronger. Abortion provides an apt example. While the Supreme Court currently recognizes that some pregnant girls are mature and fully competent to make the decision whether to terminate a pregnancy on their own, mature adolescent girls in some states with parental consent or notification laws might still have to go to court and convince a judge of this fact.[100] The Supreme Court's rationale for allowing states to impose this extra hurdle on adolescent girls is that their decision-making capacities are often less mature than those of adults. Yet the incapacities analysis misses important dimensions to this issue. Psychoanalysis would pose the following questions: Is a teenage girl's forced pregnancy likely to induce in her overwhelming feelings of shame, rage, frustration, fear, regret, and resentment, resulting in a regressive disintegration of psychic stability? Are the caregiving skills of adolescent girls likely to be minimal given the added psychological stress of a forced pregnancy? Is an adolescent girl's experience of a forced pregnancy likely to have adverse consequences for her sense of self or be more severe than for an adult woman? Rather than being catapulted into adult maturity, are young girls more likely to feel the lifelong effects of a developmental trauma stimulating their own regressive needs for maternal care? The answers to these questions would likely open the door to recognizing an adolescent girl's right to terminate an unwanted pregnancy without parental or judicial oversight.

In recent years, the Supreme Court has set limits on the state's power to impose the most severe penalties on individuals who committed their crimes as minors, specifically on the ground that children lack mature decision-making skills. Developmental research supports the commonsense intuition that children and younger adolescents differ from adults in their

criminal behavior.[101] Although some might assume that older adolescents have attained adult decision-making skills, research shows that adolescent judgment overall is impaired by a propensity for risk-taking behavior, a failure to consider long-term consequences of behavior, a susceptibility to peer pressure, and an unformed character.[102] But psychoanalysis deepens this analysis. It views such "deficits" through a more holistic lens of adolescent capacities and development. We miss the whole picture if we view adolescents as simply weaker creatures vulnerable to peer pressure. In other contexts, peer relationships can be a source of important developmental growth and resilience, and in some contexts it should be recognized and protected. Custody determinations, for example, should take into account the benefit to children of maintaining close, positive peer and mentor relationships.

Finally, children's capacity for psychic change—or in juvenile justice terms, "rehabilitation"—lies at the core of a psychoanalytic approach to children's rights. Applied to children, the term "rehabilitation" is something of a misnomer. When rehabilitation works, it is not restoring a child to some prior state of mind, but bringing the child to a new, more stable and adaptive place. The fact that children possess this dramatic capacity for developmental change supports basic transitional rights to rehabilitation in the juvenile justice arena. The Supreme Court's decisions striking down the death penalty for individuals who committed their crimes as juveniles, as well as mandatory life-without-parole sentences, are laudable.[103] But the Supreme Court has yet to hold that juvenile life-without-parole sentences—imposed at the discretion of a judge or jury—are unconstitutional. Moreover, in many states children can be transferred from juvenile court to the adult criminal justice system when they have committed a serious crime. Proponents of transfer suggest that the adult nature of the crime implies a corresponding maturity on the part of the juvenile offender. Yet a psychoanalytic perspective would find the imposition of adult criminal sentences—and in particular a sentence of life without parole—a clear violation of children's right to meaningful rehabilitation. Harsh sentencing ignores the psychological vulnerability of adolescents to stressful environmental factors such as peer violence, poverty, and parental abuse or neglect. It also tragically ignores children's capacity for change.

Psychoanalysis opens our eyes to how children's intrinsic experiences, unique capacities, and future autonomy interests come together to create a new framework for children's rights in constitutional law. An understanding of psychoanalysis frees us from the adult-centered, rights-denying bias of the incapacities framework. A psychoanalytic perspective turns out to be rights-expanding: it illuminates the importance of children's transitional rights rooted not in autonomy, but in children's distinct experiences and capacities. Transitional rights emphasize play and imagination over rules and discipline, loving households over cognitive learning in school, rehabilitation over punishment, and affirmative over negative liberties. These rights derive from fundamental psychoanalytic insights into early caregiving as the foundation for later adult autonomy rights. In these ways, psychoanalysis opens up a relational, constitutive, affirmative role for children's rights in constitutional law.

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Conclusion

This book describes the myriad ways in which the law retreats from a deep understanding of subjectivity through the use of legal fictions such as the presumption of rationality and the reasonable person standard, among others. The law generally resists looking at the ways in which individuals are influenced by unconscious forces or can deploy repression, denial, and other psychological maneuvers to keep unconscious desires and beliefs away from conscious awareness. Instead, the law conjures up the fictional rational actor, able and willing to both make and implement conscious, autonomous choices. Yet as we have seen, the legitimacy of the legal system is not well served by an insistence on fictionalized versions of rationality and free will, given an everyday reality in which choices are constrained, rationality is impaired, and self-knowledge is elusive. The law's presumptions of rationality and free will can lead to devastating errors in judgment—the determination that confessions are true when they are not, the finding that consent to sexual relations is present when it is not—as well as abandon individuals to live with the harsh consequences of their bad decisions without offering understanding, empathy, or any real pathway to rehabilitation. As we have seen, the law would come closer to realizing its ideals of individual fairness and justice by accepting the vast psychoanalytic evidence demonstrating the limits to human self-knowledge and self-control.

One of the aims of this book, therefore, has been to illustrate, chapter by chapter, how the existing gap between law's presumption of rationality and the reality of subjective life raises serious doubts about the fairness and effectiveness of legal rules and policies. We have seen how individuals may remain steadfastly ignorant of obvious wrongdoing by family members because of unconscious fears of emotional abandonment or retaliation; how

decision-making relating to intimate contracts may be affected by strong unconscious attachment needs and fantasies; how police exploitation of unconscious guilt can distort the criminal interrogation process; how violent threats may express something other than a real probability of harm; how fantasy, identification, transference, and aggression may severely undermine the "consensual" nature of adult sexual relationships; and how understanding the psychoanalytic concepts of attachment, fantasy, and psychic change leads to a recognition of children's transitional rights. These chapters show how psychoanalytic insights reform the law's conception of the autonomous, rational individual when the gap between this fictional actor and lived reality becomes too great.

Yet as we have also seen, the psychoanalytic critique of the law's rationalist paradigm can only go so far. Not every legal rule, decision, or behavior can be psychoanalyzed. A balance must be found between, on the one hand, serving the law's pragmatic need to govern and hold individuals accountable and, on the other, the importance of taking into account unconscious influences on decision-making and behavior. This nuanced, contextual inquiry into the psychological dynamics of particular legal transactions or events—prenuptial agreements, criminal interrogations, verbal threats, sexual consent—begins with the areas of intimacy and wrongdoing, where unconscious dynamics and self-deceptive tactics generally run highest. But the boundaries are obviously not fixed, and the question of where to draw the line—when to presume rationality and when to look more closely at what is really going on in the minds of legal actors—cannot be answered in the abstract. In addition to those covered in this book, many legal subjects may prove amenable to psychoanalytic study, including a few obvious candidates: sexual-harassment law, the death penalty, trusts and estates, employment contracts, intentional discrimination doctrines, property law, and obscenity law. By starting with a focus on intimacy and wrongdoing, this book begins the task of marking out, slowly and carefully, those particular areas where a psychoanalytic inquiry has the most to contribute.

This project does not stand alone in its effort to incorporate psychological ideas into the law. Modern behavioral law and economics scholars also seek to reshape the law's operating assumptions about individual rationality.

Now equipped with a basic understanding of psychoanalysis and its relevance to the law, we can usefully assess the relationship of this book's psychoanalytic project to the law and economics behavioral movement. By doing so, we may narrow the divide that separates humanistic and scientific psychological approaches to the study of law. The relationship of cognitive psychology to psychoanalysis is therefore examined here in some detail. This conclusion then brings the book to a close with an overview of psychoanalysis's distinct contributions to legal theory, doctrine, and adjudication.

Law's Cognitive Bias

The behavioral law and economics movement is riding the wave of developments in the cognitive sciences, particularly the growing experimental research into human decision-making and judgment taking place in academic psychology departments. Cognitive psychologists generally view the mind as operating according to structures, rules, and plans, much like the software of a computer processing system.[1] Their research tends to focus on perception, memory, computation, judgment, attention, language, problem-solving, and related processes in decision-making.[2] Before the late 1980s, cognitive psychologists studied conscious mental processes, in part because they believed that cognition is, by definition, conscious. But in 1987 John Kihlstrom announced the existence of the cognitive unconscious, ushering in a new era of investigation.[3] The cognitive unconscious is understood to facilitate the individual's smooth processing of information coming in from the world, allowing for quick intuitive decision-making.[4] But as researchers discovered, this efficient mental processing can go awry. The cognitive research that has been of greatest interest to legal scholars focuses on discerning how incomplete information, uncertainty, perceptions of risk, frameworks, heuristics, biases, and computational limitations operate to distort cognitive processing in systematic and predictable ways.[5] By drawing attention to these factors, many of which are unconscious, these researchers hope to correct for—to debias—mistakes in cognitive processing and thus restore rational thinking in law to its proper operations.

To behavioral legal scholars, cognitive research into the mind's biases, frameworks, and distortions provides the opportunity for reforming the law's

presumption of rationality by drawing on more accurate, scientifically established data about individual decision-making. With a better understanding of human choice, these scholars argue, will come better laws, legal decisions, and attitudes. There are few limits to the behavioral inquiry in law. Law and economics scholars have turned to scientific psychology with the goal of modifying the traditional economic model of the rational actor.[6] Criminal law scholars use cognitive research to examine the law of criminal investigations.[7] Law and society scholars have taken up scientific psychology in an effort to identify the psychological roots of discrimination.[8] Legal scholars have applied the findings of research on decision-making to areas as diverse as evidence law, product liability law, corporations law, contract law, securities fraud, legal decision-making, lawyering, and family law.[9] Even critical legal scholars and feminists have added their voices to the chorus extolling the value of scientific psychology for law.[10]

Yet in relying exclusively on cognitive psychology, behavioral legal scholars suffer from a bias of their own. Proponents of a behavioral approach use findings from cognitive psychology to identify law's erroneous assumptions about rationality, but they do so in order to perfect the rationality paradigm rather than to undermine it. Their work seeks to make decision-making more rational by reducing individual cognitive errors, uncovering mistakes and undesirable biases, and fine-tuning judgment through debiasing and other techniques. While this work sheds important light on decision-making processes, its heavy emphasis on the findings of cognitive psychology appeals to the deeply flawed notion that, with the proper modifications, rational thinking can be restored. Cognitive psychology fails to grapple with the complex ways in which our minds resist techniques for improving rational thought. Simple behavioral debiasing stands no chance against the forces of unconscious repression and resistance.

To be clear, this book does not renounce the study of decision-making carried out by behavioral legal scholars. Psychoanalysis and cognitive psychology share many of the same assumptions and aims, even if their methods and frameworks diverge.[11] Psychoanalysts would agree that cognitive research provides important and useful information about how people think, much of which is entirely consistent with psychoanalytic principles.[12]

The cognitive unconscious, with its powerful processing powers, aligns closely with Freud's theory of the "preconscious," which he described as those thoughts and memories easily brought into consciousness through effort and attention.[13] Like cognitive psychologists, psychoanalysts recognize that our unconscious helps us to adapt to the world: to learn, to problem-solve, to drive a car, to emotionally attach to others. Cognitive psychology validates important psychoanalytic concepts such as unconscious affects and the influence of early childhood.[14] In testament to these synergies, researchers and scholars have recently begun to explore the intersection of psychoanalysis and cognitive neuroscience.[15]

Where the field of behavioral law and economics falls short is in turning to cognitive psychology as the *exclusive* framework for human decision-making and behavior in law. Psychoanalysts understand the important place of cognitive thinking in mental life, but they study and understand cognition within a more holistic framework. Let us compare psychoanalytic and cognitive ideas about unconscious thought processes. Freud used the term "primary process" to refer to the earliest (hence "primary") form of thinking we experience as infants. Unconscious primary process operates according to certain nonrational laws, such as association, condensation, and displacement. Secondary process, by contrast, is understood to be a more mature form of thinking that takes the form of conscious, logical, verbal thought. As a child develops, the emergence of secondary process allows her to transform primary process wishes and fantasies into a more reality-congruent and rational form. The child learns to bring the early, more "primitive" imaginative thinking under the control of the reality-oriented ego. Rational, logical thought is a later, more disciplined, higher-order, and largely cognitive mental faculty aimed in part at controlling the unruly "irrational" unconscious. We can find adult expressions of primary process in religion, romance, art, and literature.

Freud's framework anticipated in some ways current cognitive theories about what the psychologist Daniel Kahneman calls "fast and slow" thinking.[16] As Kahneman describes it, fast thinking is intuitive and unconscious, whereas slow thinking is deliberative and conscious. Cognitive neuroscientists refer to similar parallel systems when they distinguish between implicit

or procedural knowledge and explicit or declarative thinking.[17] Implicit or procedural processes are considered adaptive ways in which the mind codes and stores information into memory and representational formats. Yet while Kahneman's model of fast-slow thinking bears some resemblance to Freud's primary and secondary processes, the similarities are misleading. The cognitive unconscious operates in parallel with conscious thinking, whereas primary and secondary processes are in dynamic interplay. From a psychoanalytic perspective, no conscious decision-making escapes the influence of primary process. Even our most mundane of choices—what to have for dinner tonight—calls upon our powers of imagination (envisioning the delight or drudgery of cooking), our associative feelings (the dish my father used to make), our unconscious wishes (to be fed emotionally, to be comforted). At times of stress, secondary process might even take a back seat to the imaginative flights of primary process thinking, as it can do in times of mourning, romance, and war.

The notion of the cognitive unconscious fails to capture the interplay between unconscious primary process thinking and conscious rational thought. Close attention reveals "the hidden linkage" and "inextricable bond" between the two.[18] As the psychoanalyst Hans Loewald explains:

> Primary and secondary process are ideal constructs. Or they may be described as poles between which human mentation moves. I mean this not only in the longitudinal sense of progression from primitive and infantile to civilized and adult mental life and regressions in the opposite direction. Mental activity appears to be characterized by a to and fro between, and interweaving of, these modes of mental processes, granted that often one or the other is dominant and more manifestly guiding mentation and that the secondary process assumes an increasingly important role on more advanced levels of mentation.[19]

For psychoanalysts, all mature thinking entails a back and forth between rational secondary process and the loose associations and intuitions of primary process thought. An utter lack of primary process functioning—no dreams, no fantasies, no romance, no imagination—would be taken as a

sign of psychopathology, not to mention an indication of a greatly impoverished, emotionally wooden inner world.[20] In a measured way, primary process allows the individual to let go of the constraints of rational, logical thought, thereby bringing a creative, emotional richness and depth to his or her experience of the world. Romantic love, creative inspiration, and spiritual transcendence are all common examples of adult experiences that involve some degree of controlled ego regression. Certain modes of everyday thinking, such as fantasies and daydreaming, exhibit regressive features. Because it brings the adult caregiver in touch with infantile modes of feeling and thinking, early child-rearing also involves a controlled measure of regression.

But there is more to be said about the limits of the cognitive paradigm. Psychoanalysis illuminates the "dynamic unconscious," that is, an unconscious characterized by *movement:* repression, resistance, conflict, fantasy, and motivation, one tasked with managing passions, aggressions, fears, anxieties, guilt, envy, desire, and self-deprecation, among a multitude of other forces. In contrast, cognitive psychology tends to view the unconscious as relatively passive, like computer software, processing information without conflict or resistance. The cognitive framework is also limited by an apparent lack of interest in the pivotal question of *why* individuals think the way they do—the issue of motivation. Why would an individual falsely confess to a crime? Why would an individual enter into a prenuptial agreement against her own self-interest? Why would a battered spouse stay with her partner? Why don't people change in the face of evidence of their own unconscious biased views? From a psychoanalytic perspective, these questions unearth a complex interplay between inner subjective experience and external reality, between past and present, and between unconscious fantasies and conscious rational thought. And these are all questions relevant to the project—shared by both psychoanalysis and behavioral economics—of developing legal rules based on how people actually think and behave.

In its method and framework, psychoanalysis aligns itself more closely with the humanities than with the psychological sciences. Nevertheless, behavioral legal studies and psychoanalysis share the goal of exposing the gap between law's fiction of rationality and the actual workings of the human

mind. While psychoanalysis gives us a much broader and richer picture of the psyche, cognitive psychology offers carefully designed experimental studies illuminating important aspects of how people think. It should come as no surprise that these studies often mesh closely with psychoanalysis's clinical data. Bringing psychoanalysts into conversation with behavioral legal scholars—building a bridge between humanistic and scientific perspectives on the mind—opens up new avenues for reforming law's current rationalist framework to better fit the facts of psychic life.

Psychoanalytic Conclusions

Scholars and judges have long eschewed psychoanalytic ideas about the unconscious—with their apparent assault on free will and self-knowledge—because these ideas have mistakenly been thought to destabilize the entire legal enterprise. But like any act of repression, the law's uncompromising adherence to the rationalist model contains a self-destructive element. It turns out that the *failure* to take psychoanalytic insights about the unconscious into account brings about its own destabilizing effects, which occur whenever legal rules deviate too radically from the everyday reality those rules are meant to order and control. The repression of unconscious life—the denial of the irrationality in human behavior and experience—poses a greater long-term threat to our system of justice than does psychoanalysis.

A psychoanalytic perspective has implications well beyond attacking the presumption of rationality at the level of legal rules and doctrines. At a normative level too, psychoanalysis helps us to see what is at stake for a liberal legal system premised upon the values of personal autonomy and individual rights. Critical scholars of all stripes—feminists, communitarians, critical race scholars, queer theorists—question the basic commitments of a liberal regime that elevates the bounded, autonomous individual over identities formed around relationships, communities, families, transgression, or difference—or sometimes no clear identity at all. Why rescue the liberal regime from its misguided presumptions rather than reorient our legal system around a different set of values: relationships, communities, obligations to others, social bonds, transgression? Psychoanalysis clearly shares with critical scholarship a suspi-

cion of the liberal self, and indeed, many of these critical scholars draw from psychoanalysis. But psychoanalysis also points us toward the importance of establishing a stable, coherent self over time. Psychoanalytic treatment aims to cultivate in the patient an increased capacity for self-reflection and self-determination, or in psychoanalytic terms, an expanded range of ego control over unconscious feelings, thoughts, and desires. In both theory and practice, psychoanalysis recognizes the important role of strong ego functioning in warding off the dangers of a disintegrating, regressive, traumatic loss of self.

Psychoanalysis in this way supplements and modifies the liberal framework with insights shared by critical scholars in feminism, critical race theory, and queer studies. These critical approaches have much that divide them one from the other, and they rarely have anything good to say about liberalism. But a psychoanalytic perspective shares with feminism an emphasis on the importance of relationships, empathy, and narrative in the development of a sense of self.[21] Psychoanalysis joins with critical race theory in seeing the multiple, intersecting, and sometimes conflicting dimensions to identity.[22] And psychoanalysis, in line with queer studies, offers a theory of the self that is unstable, bodily, and transgressive. The legal scholar Janet Halley calls for an end to the attempt to harmonize theory, and her point could be expanded to the effort undertaken here to harmonize psychoanalysis with progressive critiques of liberalism.[23] But while no single framework can hold them all—splits and conflicts abound—psychoanalysis resonates with many of these critical concerns, all of which are relevant to the important project of modifying the liberal ideal of the rational, autonomous individual by providing a thick description of the self and its relationship to the world. Psychoanalysis reaffirms and deepens law's commitment to the ideals of personal autonomy and free will at the same time that it aligns with critical legal theorists' views on the limits of the liberal paradigm.

This psychoanalytic balance between a stable, rational, coherent identity and an unstable, conflicted, desiring self resonates with debates over rationalism and romanticism within philosophy and literature. Broadly speaking, rationalism and romanticism offer competing conceptions of the individual: one an autonomous, reasoning actor, and the other a desiring, passionate being freed from the constraints of reason. Kant argued that autonomy

is achieved only by a rational will transcending appetite and desire.[24] In contrast, the romantic poets are known to have elevated feeling and imagination over reason.[25] Psychoanalysis helps us see that the relationship between reason and desire is not necessarily a conflict between two opposing views of selfhood. Some romantics did directly condemn the "murderous" effects of analytic reasoning, as Wordsworth wrote:

> Sweet is the lore which Nature brings;
> Our meddling intellect
> Mis-shapes the beauteous forms of things:—
> We murder to dissect.[26]

But others, like Coleridge, believed that "scientific and critical understanding" should be supplemented, rather than displaced, by "intuitive reason."[27] Psychoanalysis too views reason and desire as stabilizing allies. A psychoanalytic perspective perfectly captures the necessary psychological equilibrium between rational thought and embodied love: a balance between conscious choice and unconscious desire, self-reflection and drive, reality-based aims and wishful fantasy.

In offering a portrait of the individual that is neither fully rational nor fully irrational, psychoanalysis helps to give substance to the law's ideals of individual liberty and personal autonomy. The fact that much of mental life is unconscious and opaque to critical inquiry, that individuals actively keep memories and ideas out of consciousness, and that aggressive and self-destructive instincts and urges are inherent in human nature—all combine to modulate any extreme faith in the individual's capacity for conscious, rational choice. But psychoanalysis also exhibits optimism about the role of reasoning capacities in helping the individual to overcome unconscious barriers to self-knowledge and agency. The idea of bringing ego strengths to bear on unconscious feelings and patterns of thinking through reasoned self-reflection still lies at the core of psychoanalytic theory and practice today.

A legal system committed to the ideals of free will and personal autonomy must value the process of self-reflection and the social and political structures that foster it. From a psychoanalytic perspective, we have the capacity and responsibility to reflect on our own minds. In this way, psychoanalysis

offers an affirmative agenda for law. In our liberal society, families and schools should be oriented toward instilling the value of self-reflection in developing children; judicial institutions such as courts, alternative dispute programs, and prisons should foster self-inquiry as part of their rehabilitative mission; judges themselves should be taught to reflect on what they bring to their decisions on the bench. Psychoanalysis shows us that self-reflection, like tolerance and open-mindedness, defines and sustains a liberal culture's commitment to individual liberty and personal autonomy. In recognizing the barriers to self-understanding and the importance of self-reflection, psychoanalysis helps us to bring legal ideals and rules into closer proximity with the real parameters of human choice.

A word before closing this book on psychoanalysis's own legal theory. In *Totem and Taboo*, Freud initiated a psychoanalytic theory of the law by positing the origins of law in the paternal incest taboo.[28] While his anthropological assertions have been soundly discredited, there is nevertheless something of value in Freud's effort to understand the individual's initiation into the rule of law. Freud viewed law in terms of prohibitions aimed at controlling our base aggressions and desires. At the individual level, Freud argued, the child learns to obey parental law out of fear that the father will unleash his "castrating" fury. While the child's love for the father plays a part in the child's acquiescence to the father's commands, Freud saw aggression toward the father and the resulting superego guilt as the dominant forces in the emergence of a law-abiding orientation toward the world.[29]

In contrast, contemporary psychoanalysts would take a more gender-neutral, and perhaps commonsense, view of the matter. They would be more likely to locate the origins of law-abidingness in the infant's needs for attachment to the parental caregiver.[30] In this account, the child's earliest inclinations to obey authority arise initially out of love rather than fear or guilt. This modern psychoanalytic story draws our attention to law's affirmative, constitutive power, one that predates and supplements law's later prohibitions and punishments. The story tracks the standard account of psychoanalysis's shift, described in the introduction to this book, from classical Freudian psychology to contemporary object relations theory. The main focus of this book, however, has been not on the origins of law and

law-abidingness, but on what psychoanalysis has to offer law as it operates in the world we now inhabit.

The study of law and psychoanalysis offers the opportunity for a deep, fruitful engagement between two disciplines centered on how and why people think and behave the way they do. Far from being adversaries, both fields – law and psychoanalysis – must balance a commitment to rationality and free will against a much more complex psychic reality. As we have seen, law has much to learn from psychoanalysis in undertaking this endeavor. A psychoanalytic perspective deepens and complicates the law's conception of personal responsibility and free will, and in doing so provides a more meaningful portrait of individual decision-making and the conditions that foster it. Psychoanalysis offers a vision of human agency and flourishing that sits uneasily at the boundaries between conscious and unconscious, fantasy and reality, self and other, insight and opacity. This complex portrait of the psyche gives legal decision-makers and scholars the tools to develop a psychoanalytically sophisticated framework that makes good on our legal system's fundamental commitments to personal freedom, individual fairness, and social justice.

NOTES

Introduction

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3. *See* Albert J. Solnit, Anna Freud & Joseph Goldstein, Beyond the Best Interests of the Child (1973).
4. *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (3d ed., 1980).
5. *See* Robert Gray, *The Assault on Freud*, Time, Nov. 29, 1993, cover.
6. W. H. Auden, *In Memory of Sigmund Freud*, *in* Collected Poems 273, 275 (Edward Mendelson ed., 1991).
7. *See* Stephen A. Mitchell, *Object Relations Theories and the Developmental Tilt*, 20 Contemp. Psychoanalysis 473, 474 (1984); *see also* Psychoanalytic Terms and Concepts 119 (Elizabeth L. Auchincloss & Eslee Samberg eds., 2012).
8. *See, e.g.*, Adolph Grünbaum, The Foundations of Psychoanalysis: A Philosophical Critique (1984); Stephen Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 U. Pa. L. Rev. 971, 1016 (1982).
9. Although critics also deride psychoanalysis for lacking scientifically validated outcome studies, research supports the efficacy of psychoanalytic treatment for some disorders. *See, e.g.*, Andrew Gerber et al., *A Quality-Based Review of Randomized Controlled Trials of Psychodynamic Psychotherapy*, 168 Am. J. Psychiatry 19 (2011); Jonathan Shedler, *The Efficacy of Psychodynamic Psychotherapy*, 68 Am. Psychologist 98 (2009). Work is also being undertaken in the area of psychoanalysis and neuroscience. *See* Casey Schwartz, In the Mind Fields: Exploring the New Science of Neuropsychoanalysis (2015).

11. Eric R. Kandel, Psychiatry, Psychoanalysis, and the New Biology of Mind 64 (2005).
12. *See* Phillip Rieff, Freud: The Mind of the Moralist 247 (1959).
13. *See* Jonathan Lear, Open Minded: Working Out the Logic of the Soul (1998).
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15. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).
16. *See generally* Anne C. Dailey, *Preface*, 64 Am. Imago 291 (2007) (introducing a special edition of American Imago, titled *Legal Analysis*, featuring essays by Amy Adler, Susan R. Schmeiser, Adam Sitze, Nomi Maya Stolzenberg, Ravit Reichman, and Martha Merrill Umphrey); Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. Pa. L. Rev. 817 (1986).
17. *See* Peter Brooks, Troubling Confessions: Speaking Guilt in Law and Literature (2000).
18. *See* Martha Grace Duncan, Romantic Outlaws, Beloved Prisons: The Unconscious Meanings of Crime and Punishment (1996).
19. *See* Elyn R. Saks & Shahrokh Golshan, Informed Consent to Psychoanalysis: The Law, the Theory, and the Data (Psychoanalytic Interventions) (2013); Elyn R. Saks, Interpreting Interpretation: The Limits of Hermeneutic Psychoanalysis (1999).
20. *See* Clare Huntington, *Repairing Family Law*, 57 Duke L.J. 1245 (2008).
21. *See* Law and the Postmodern Mind (Peter Goodrich & David Gray Carlson eds., 1998); *see also* Maria Aristodemou, Law, Psychoanalysis, Society: Taking the Unconscious Seriously (2014); David S. Caudill, Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory (1997); Peter Goodrich, Oedipus Lex: Psychoanalysis, History, Law (1995); Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 Harv. L. Rev. 483 (1998).
22. *See* Cathy Caruth, Unclaimed Experience: Trauma, Narrative, and History (1996); Shoshana Felman & Dori Laub, Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History (1991).

1 Why Psychoanalysis Matters to Law

1. Psychological fields other than psychoanalysis now also study the unconscious. See the discussion of behavioral law and economics in the conclusion to this book.
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3. *See* Sigmund Freud, *The Psychopathology of Everyday Life*, *in* 6 The Standard Edition of the Complete Psychological Works of Sigmund Freud 8 (James Strachey trans. & ed., 1901/1960).

4. The Kristeva Reader 13 (Toril Moi ed., 1986).
5. Jonathan Lear, Open Minded: Working Out the Logic of the Soul (1998); Sigmund Freud, *Notes Upon a Case of Obsessional Neurosis*, *in* 10 Standard Edition 158, 209 (1909/1955).
6. *See* Heinz Kohut, The Restoration of the Self (1977); Edith Jacobson, The Self and the Object World (1964); Leo Rangell, *The Self in Psychoanalytic Theory*, 30 J. Am. Psychoanalytic Ass'n 863 (1982).
7. Kirschner, The Religious and Romantic Origins, *supra*, at 178 n.92; William J. McGrath, Freud's Discovery of Psychoanalysis: The Politics of Hysteria 80 (1985).
8. Sigmund Freud, *New Introductory Lectures on Psycho-Analysis*, *in* 22 Standard Edition 3 (1933/1964).
9. *See also* Sigmund Freud, *Psycho-Analysis and the Establishment of the Facts in Legal Proceedings*, *in* 9 Standard Edition 97 (1906/1959).
10. A defendant may also be punished for reckless behavior, but the government must prove that the defendant acted with conscious disregard of the risk of harm. Reckless individuals are deemed responsible because they consciously made the decision to engage in the risky behavior despite knowing that harmful results were likely to follow.
11. Elonis v. United States, 135 S.Ct. 2001, 2009 (2015) (quoting United States v. Balint, 258 U.S. 250, 251 (1922)).
12. *See* chapter 2.
13. Freud, *Psycho-Analysis and the Establishment of the Facts in Legal Proceedings*, *supra*, at 103, 108.
14. *Id.* at 113.
15. *Editor's Note*, *in* 9 Standard Edition 99 (1906/1959).
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17. *See* Jon Elster, *Solomonic Judgment: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 36 (1987).
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19. *Id.* at 265–66.
20. Roy Schafer, *Action and Narration in Psychoanalysis*, 12 New Lit. Hist. 61, 62 (1980).
21. Peter Brooks, Psychoanalysis and Storytelling 59 (1994).
22. *See, e.g.*, Janet Malcolm, Iphigenia in Forest Hills: Anatomy of a Murder Trial (2011).
23. John E. Coons, *Compromise as Precise Justice*, 68 Cal. L. Rev. 250, 260 (1980) (internal quotation marks omitted).
24. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

25. *See* Robert M. Cover, *The Supreme Court, 1982 Term – Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4 (1983).
26. *Cf.* Martha Nussbaum, Poetic Justice: The Literary Imagination and Public Life (1996); Anne C. Dailey, *Feminism's Return to Liberalism*, 102 Yale L.J. 1265 (1993) (reviewing Katherine T. Bartlett & Rosanne Kennedy, Feminist Legal Theory: Readings in Law and Gender (1991)).

2 The Psychoanalytic Tradition in American Law

1. Alan A. Stone, Law, Psychiatry, and Morality: Essays and Analysis (1984).
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4. *See* Morton White, Social Thought in America: The Revolt Against Formalism (1957).
5. Oliver Wendell Holmes, Jr., *The Profession of the Law*, *in* 3 The Collected Works of Justice Holmes 471, 472 (Sheldon M. Novick ed., 1995).
6. *See* Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 464 (1909).
7. *See* Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908); Ruth Bader Ginsburg, Muller v. Oregon: *One Hundred Years Later*, Willamette L. Rev. 359 (2009).
8. *See* Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973); Jerome Frank, Law and the Modern Mind (1930).
9. *See* John C. Burnham, *The New Psychology: From Narcissism to Social Control*, *in* Change and Continuity in Twentieth-Century America: The 1920s (John Braeman et al. eds., 1968); *see also* Nathan G. Hale, Jr., Freud and the Americans: The Beginnings of Psychoanalysis in the United States 1876–1917, 397–400 (1971).
10. John C. Burnham, *The Influence of Psychoanalysis upon American Culture*, *in* American Psychoanalysis: Origins and Development 52, 58 (Jacques M. Quen & Eric T. Carlson eds., 1978); *see also* David Shakow & David Rapaport, The Influence of Freud on American Psychology 56 (1964).
11. *See* Ben Shephard, A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century 106 (2001).
12. *See* Harold Lasswell, *The Impact of Psychoanalytic Thinking on the Social Sciences*, *in* Psychoanalysis and Social Science (Hendrik Ruitenbeek ed., 1962); Purcell, The Crisis of Democratic Theory, *supra*, at 99.

13. *See* James Harvey Robinson, The Mind in the Making: The Relationship of Intelligence to Social Reform (1921).
14. *See* Bronislaw Malinowski, Crime and Custom in Savage Society (1926).
15. *See* Walter Lippmann, A Preface to Politics (1913).
16. *See* Shakow & Rapaport, The Influence of Freud, *supra*, at 57.
17. *See* Hale, Freud and the Americans: The Beginnings, *supra*, at 4; Shakow & Rapaport, The Influence of Freud, *supra*, at 63.
18. Edwin B. Holt, The Freudian Wish and Its Place in Ethics (1915).
19. Lippmann, A Preface to Politics, *supra*.
20. *See* Hendrik Ruitenbeek, Freud and America 68 (1966).
21. *See* Peter Gay, Freud: A Life for Our Time (1988).
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23. Frank, Law and the Modern Mind, *supra*; *see also* Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 175 (1992); Laura Kalman, Legal Realism at Yale 1927–1960 (1986).
24. Kalman, Legal Realism at Yale, *supra*, at 8; *see also* Charles E. Clark, *Jerome N. Frank*, 66 Yale L.J. 817, 817 (1956) (observing that Frank's book "fell like a bomb on the legal world").
25. *See* John Watson, Behavior: An Introduction to Comparative Psychology (1914).
26. Oliver Wendell Holmes, Jr., The Common Law (1881).
27. *See* Anne C. Dailey, *Holmes and the Romantic Mind*, 48 Duke L.J. 429 (1998).
28. *See* Holmes, The Common Law, *supra*, at 1.
29. *See* Henri F. Ellenberger, The Discovery of the Unconscious 311–21 (1970); C. P. Oberndorf, A History of Psychoanalysis in America 31 (1953).
30. Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907).
31. Oliver Wendell Holmes, Jr., *Speech Before the Bar Association of Boston* (March 7, 1900), *in* 3 The Collected Works of Justice Holmes 498, 500 (Sheldon M. Novick ed., 1995).
32. *See* Holmes, The Common Law, *supra*, at 1, 44 (plank; revenge); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897) (possessions); Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 453 (1899) (virtuous women).
33. *See* Holmes, *The Path of the Law*, *supra*, at 469.
34. *Id.* at 469, 476.
35. *Id.* at 469.
36. *See* Holmes, The Common Law, *supra*, at 5.
37. *Id.* at 37.
38. Holmes, *The Path of the Law*, *supra*, at 463.

39. Holmes, The Common Law, *supra*, at 38.
40. *Id.* at 109.
41. *Id.* at 110.
42. *Id.* at 307.
43. Sigmund Freud, *Psycho-Analysis and the Establishment of the Facts in Legal Proceedings*, *in* 9 The Standard Edition of the Complete Psychological Works of Sigmund Freud 97 (James Strachey trans. & ed., 1906/1959).
44. Letter from Sir Frederick Pollock to Oliver Wendell Holmes, Jr. (Aug. 16, 1929), *in* 2 Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874–1932 251 (Mark DeWolfe Howe ed., 1941).
45. *See* Joseph Breuer & Sigmund Freud, *Studies on Hysteria*, *in* 2 Standard Edition 1 (1893–1895/1955).
46. Letter from Oliver Wendell Holmes, Jr., to Lewis Einstein (July 2, 1914), *in* The Holmes-Einstein Letters: The Correspondence of Mr. Justice Holmes and Lewis Einstein 1903–1935 98 (J. B. Peabody ed., 1964).
47. Letter from Oliver Wendell Holmes, Jr., to Lewis Einstein (July 20, 1914), *in* The Holmes-Einstein Letters, *supra*, at 98; *see also* Letter from Holmes to Frederick Pollock (Dec. 29, 1915), *in* Holmes-Pollock Letters, *supra*, at 229 ("I read a little book, *The Freudian Wish*, by Holt, Harvard College, who seems to think that psychology is reborn between Freud and him but from whose work I derived less nourishment than Walter Lippmann who sent it to me seemed to have done."); Letter from Holmes to Lewis Einstein (Jan. 1, 1916), *in* The Holmes-Einstein Letters, *supra*, at 121 ("A new psychology book starting from Freud, *The Freudian Wit* [*sic*], impresses my young friends at the New Republic rather more than it does me.").
48. *See* Dailey, *Holmes and the Romantic Mind*, *supra*.
49. Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (June 1, 1922), *in* 1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916–1935 429–30 (Mark DeWolfe Howe ed., 1953).
50. *See* Debs v. United States, 249 U.S. 211, 216 (1919).
51. *See* David M. Rabban, Free Speech in Its Forgotten Years, 1870–1920 2 (1997).
52. *See id.* at 54.
53. Theodore Schroeder, "Obscene" Literature and Constitutional Law: A Forensic Defense of Freedom of the Press (1911).
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55. *See* Shakow & Rapaport, The Influence of Freud, *supra*, at 51.
56. Burnham, *The New Psychology*, *supra*, at 387.
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America's Cultural and Legal Struggles Over Free Speech, Obscenity, Sexual Liberation, and Modern Art (1996).

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59. *See* William L. O'Neill, *Divorce in the Progressive Era*, 17 Am. Q. 203 (1965); John C. Burnham, *The Progressive Era Revolution in American Attitudes Toward Sex*, 59 J. Am. Hist. 885, 890–96 (1973).
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61. *See* Burnham, *The New Psychology*, *supra*, at 66.
62. *See* O'Neill, *Divorce in the Progressive Era*, *supra*, at 204; Burnham, *The Progressive Era Revolution*, *supra*, at 898; *see also* J. Stanley Hall, Adolescence: Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education (1904).
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65. *See* Rabbin, Free Speech, *supra*, at 3.
66. *See* Shakow & Rapaport, The Influence of Freud, *supra*, at 37; Burnham, *The Progressive Movement*, *supra*, at 463.
67. *See* Gustave Le Bon, The Crowd: A Study of the Popular Mind (1895).
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69. Bertrand Russell, *Some Psychological Difficulties of Pacifism in Wartime*, *in* We Did Not Fight: 1914–1918 Experiences of War Resisters 308 (Julian Bell ed., 1935).
70. Roscoe Pound, *Interests of Personality*, 28 Harv. L. Rev. 445, 455 (1915) (emphasis added); *see also* David M. Rabban, *Free Speech in Progressive Legal Thought*, 74 Tex. L. Rev. 951, 1000–1001 (1996).
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72. *Debs*, 249 U.S. at 216.
73. Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).
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80. John Dewey, *The Cult of Irrationality*, The New Republic, Nov. 9, 1918, at 35.
81. *Id.* at 34.
82. *See* Theodore Schroeder, *Psychology, Democracy and Free Speech*, Medico-Legal J., July 1917, at 1, 6.
83. James Harvey Robinson, *The Still Small Voice of the Herd*, 32 Pol. Sci. Q. 312, 318 (1917).
84. *See* David N. Noble, *The New Republic and the Idea of Progress, 1914–1920*, 38 Miss. Valley Hist. Rev. 387, 400 (1951).
85. *See* Burnham, *The New Psychology*, *supra*, at 48.
86. *See* Paula S. Fass, *Making and Remaking an Event: The Leopold and Loeb Case in American Culture*, 80 J. of Am. Hist. 919 (1993).
87. *Id.*
88. *See* Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 Iowa L. Rev. 989, 990 n.9 (1994) (citing Symposium, *The Loeb-Leopold Murder of Franks in Chicago*, 15 J. Crim. L. & Criminology 347, 347 (1924)).
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90. *See* Maureen McKernan, The Amazing Crime and Trial of Leopold and Loeb 71 (1989).
91. *See id.* at 375.
92. *See* Howe, *Reassessing the Individualization Mandate*, *supra*, at 1001.
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101. *See* McKernan, The Amazing Crime, *supra*, at 142, 155.
102. *Id.* at 378.
103. *Id.* at 279.
104. Fass, *Making and Remaking an Event*, *supra*, at 924.

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106. *Id.* at 140.
107. *See* Gay, Freud, *supra*, at 453–54.
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118. *See* Duxbury, *Jerome Frank and the Legacy of Legal Realism*, *supra*, at 179.
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135. *See* Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 Ill. L. Rev. 601 (2005).

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148. *See Durham*, 214 F.2d at 870 n.25.
149. *See* Guttmacher, *Psychiatry and the Courts*, *supra*, at 165.
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151. State v. Jones, 50 N.H. 369 (1871); *see* State v. Pike, 49 N.H. 399 (1870).
152. *See Brawner*, 471 F.2d at 1106.
153. Guttmacher, *Psychiatry and the Courts*, *supra*, at 165.
154. *See* Green, Freedom and Criminal Responsibility, *supra*, at 225–29.
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160. Sheldon Glueck, Crime and Justice 244 (1936).
161. Winfred Overholser, The Psychiatrist and the Law (1953).
162. Lionel Trilling, Freud and the Crisis of Our Culture (1955).
163. Guttmacher served as a special consultant on the Model Penal Code's section on the insanity defense.
164. Manfred S. Guttmacher & Henry Weihofen, Psychiatry and the Law (1952); *see* Jay Katz, Joseph Goldstein & Alan M. Dershowitz, Psychoanalysis, Psychiatry and Law 470 (1967).
165. Guttmacher & Weihofen, Psychiatry and the Law, *supra*, at 20.

166. *See* Guttmacher, *Psychiatry and the Courts*, *supra*, at 165–66.
167. *Id.* at 174.
168. Am. Law Inst., Model Penal Code (Ten. Draft No. 4, 1955), at 189.
169. *Id.* at 203.
170. *Id.*
171. Am. Law Inst., *Responsibility*, 46 J. Crim. L. & Criminology 450, 457 (1955).
172. *Brawner*, 471 F.2d at 969.
173. *See, e.g.*, Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 Va. L. Rev. 971 (1982); Michael S. Moore, *Responsibility and the Unconscious*, 53 S. Cal. L. Rev. 1563 (1980).
174. *See* Duxbury, *Jerome Frank and the Legacy of Legal Realism*, *supra*, at 176–77.
175. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929).
176. *Id.* at 675, 677.
177. *Id.* at 686.
178. *Id.* at 683.
179. *Id.*
180. *Id.* at 684.
181. *Id.* (citing Sigmund Freud, *The Psychopathology of Everyday Life*, *in* 6 Standard Edition 1 (1901/1960)).
182. Edward Stevens Robinson, Law and the Lawyers 61 (1935).
183. Joseph Goldstein, Anna Freud & Albert J. Solnit, Beyond the Best Interests of the Child (1973).
184. *Id.* at 53.
185. *Id.* at 6.
186. *Id.* at 19.
187. *Id.* at 63.
188. *See* Troxel v. Granville, 530 U.S. 57 (2000).
189. *See* the introduction.
190. *See* Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 Yale L.J. 1053 (1968).

3 Psychoanalysis and Free Will

1. Some of the terms used here ("free will," "determinism," "incompatibility") have developed specialized meanings within philosophy. I use these words here to clarify psychoanalytic ideas without joining the complex and nuanced philosophical debates over free will. For an accessible overview of the latter, *see* Robert Kane, A Contemporary Introduction to Free Will (2005).
2. State v. Sikora, 210 A.2d 193, 205 (N.J. 1965).
3. Elonis v. United States, 135 S.Ct. 2001, 2009 (2015) (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).

4. *Id.* at 9–10 (quoting *Morissette*, 342 U.S. at 250).
5. *Sikora*, 210 A.2d at 202.
6. *See* Lawrence v. Texas, 539 U.S. 558 (2003).
7. *See* Obergefell v. Hodges, 135 S.Ct. 2584 (2015); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
8. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).
9. *See* Susanna Blumenthal, Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture (2016).
10. *See* Blumenthal, Law and the Modern Mind, *supra*; Thomas Andrew Green, Freedom and Criminal Responsibility in American Legal Thought (2014); Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 Va. L. Rev. 971 (1982); Michael S. Moore, *Responsibility for Unconsciously Motivated Action*, 2 Int'l J. of L. and Psychiatry 323 (1979).
11. Report of the Special Committee on the Rights of the Mentally Ill, 70 A.B.A. Rep. 338, 339 (1945).
12. Robert P. Knight, *Determinism, "Freedom," and Psychotherapy*, 9 Psychiatry 251, 252 (1946).
13. Wilber G. Katz, *Law, Psychiatry, and Free Will*, 22 U. Chi. L. Rev. 397, 398 (1955).
14. *See* United States v. Heredia, 483 F.3d 913, 917 (9th Cir. 2007).
15. *See id.* at 917–18.
16. *Id.* at 918 (quoting United States v. Jewell, 532 F.2d 697, 702 (9th Cir. 1976)) (emphasis added).
17. *Id.* at 918 n.4. The Supreme Court has endorsed this version of the willful blindness doctrine, which some trace back to the 1962 proposed draft of the Model Penal Code. *See* Global-Tech Appliances v. SEB, 563 U.S. 754 (2011); David Luban, *Contrived Ignorance*, 87 Geo. L.J. 957 (1999).
18. *Heredia*, 483 F.3d at 919 (quoting *Jewell*, 532 F.2d at 699).
19. *Id.* at 920 n.10.
20. *Id.* at 925 (Kleinfeld, J., concurring in the result).
21. While Judge Graber voted to reverse Heredia's conviction, she did so on the ground that the willful blindness instruction was improper in this case because the jury might have found that Heredia had actual knowledge of the drugs. *See id.* at 932–33 (Graber, J., dissenting).
22. *Id.* at 932.
23. Franz Alexander & Hugo Staub, The Criminal, the Judge, and the Public 71 (1931).
24. *Id.*
25. *See* Knight, *Determinism, "Freedom," and Psychotherapy*, *supra*, at 251.
26. John Hospers, *Free Will and Psychoanalysis*, *in* Freedom and Responsibility: Readings on Philosophy and Law 463, 466 (Herbert Morris ed., 1961).
27. Sigmund Freud, *Two Encyclopedia Articles*, *in* 18 The Standard Edition of the Complete Psychological Works of Sigmund Freud 233, 238 (James Strachey trans. & ed., 1923/1955).

28. Michael Franz Basch, *Psychic Determinism and Freedom of Will*, 5 Int'l Rev. of Psycho-Analysis 257, 259 (1978).
29. Phillip Rieff, Freud: The Mind of the Moralist 117 (1959).
30. *Id.* at 53.
31. Sigmund Freud, *The Ego and the Id*, *in* 19 Standard Edition 1, 27 (1923/1961).
32. Sigmund Freud, *New Introductory Lectures on Psycho-Analysis*, *in* 22 Standard Edition 3, 106 (1933/1964).
33. *See* Joseph Breuer & Sigmund Freud, *Studies on Hysteria*, *in* 2 Standard Edition 1, 305.
34. Psychoanalytic Terms and Concepts 10 (Elizabeth L. Auchincloss & Eslee Samberg eds., 2012).
35. *Cf.* Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, *in* Free Will (Gary Watson ed., 2d ed., 2003).
36. *See* Sigmund Freud, *Fragments of an Analysis of a Case of Hysteria*, *in* 7 Standard Edition 1 (1905/1953).
37. Sigmund Freud, *Observations on Transference-Love*, *in* 12 Standard Edition 157, 159 (1915/1958).
38. *See* Daniel Kahneman, Thinking, Fast and Slow (2013).
39. John F. Kihlstrom, *The Cognitive Unconscious*, 237 Sci. 1445 (1987).
40. *See* Anthony G. Greenwald & Mahzarin R. Banaji, Blindspot: Hidden Biases of Good People (2013).
41. *See* Sigmund Freud, *Analysis Terminable and Interminable*, *in* 23 Standard Edition 209 (1937/1964).
42. Morse, *Failed Explanations*, *supra*, at 1034.
43. *See* Moore, *Responsibility for Unconsciously Motivated Action*, *supra*.
44. *Id.* at 327 (quoting Sigmund Freud, *The Psychopathology of Everyday Life*, *in* 6 Standard Edition 1, 79 (1901/1960)).
45. *Id.*
46. *See* Anne C. Dailey, *Abject or Autonomous?: Patient Consent to Psychoanalytic Treatment*, 62 J. of the Am. Psychoanalytic Ass'n 1119 (2014).
47. *See* Sigmund Freud, *Psycho-Analysis and the Establishment of the Facts in Legal Proceedings*, *in* 9 Standard Edition 97 (1906/1959).
48. *See* Morse, *Failed Explanations*, *supra*, at 1041 n.189.

4 Guilty Minds

1. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).
2. *See* Richard A. Leo, Police Interrogation and American Justice 3 (2008).
3. *See id.* at 2.
4. Dan Simon, In Doubt: The Psychology of the Criminal Justice System 132 (2013).

5. Brewer v. Williams, 430 U.S. 387, 420 (1977) (Burger, C.J., dissenting) (citing Theodor Reik, The Compulsion to Confess (1925)).
6. Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria*, *in* 7 The Standard Edition of the Complete Psychological Works of Sigmund Freud 1, 77 (James Strachey trans. & ed., 1905/1953).
7. Culombe v. Connecticut, 367 U.S. 568, 616 (1961).
8. *See* Peter Brooks, Troubling Confessions: Speaking Guilt in Law and Literature 4–5 (2000); *see also* Susan R. Schmeiser, *Punishing Guilt*, 64 Am. Imago 317 (2007).
9. *See Culombe*, 367 U.S. at 582.
10. Dickerson v. United States, 530 U.S. 428, 434 (2000) (quoting Stein v. New York, 346 U.S. 156, 185 (1953)).
11. *See* Miranda v. Arizona, 384 U.S. 436 (1966); *see also* Louis Michael Seidman, *Brown and Miranda*, 80 Calif. L. Rev. 673, 745 (1992).
12. *Culombe*, 367 U.S. at 602.
13. *Dickerson*, 530 U.S. at 444.
14. *See generally* Brooks, Troubling Confessions, *supra*.
15. For the authoritative manual on police interrogation, *see* Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, Essentials of the Reid Technique: Criminal Interrogation and Confessions (2d ed., 2013).
16. Brewer v. Williams, 430 U.S. 387 (1977).
17. *Id.* at 392–93.
18. *See* Nix v. Williams, 467 U.S. 431, 440 (1984).
19. *Brewer*, 430 U.S. at 419.
20. *Id.* at 434 (White, J., dissenting).
21. *Culombe*, 367 U.S. at 642 (Harlan, J., dissenting).
22. *Fulminante*, 499 U.S. at 293.
23. *See* Brooks, Troubling Confessions, *supra*, at 23.
24. *See* Leo, Police Interrogation, *supra*; *see also* Julia Simon-Kerr, *Legitimacy and Deceptive Interrogations* (manuscript on file with the author).
25. Leo, Police Interrogation, *supra*, at 122–23.
26. *Miranda*, 384 U.S. at 469.
27. *Id.* at 457.
28. *Id.* at 465.
29. *Id.* at 467.
30. *Dickerson*, 530 U.S. at 444.
31. Brooks, Troubling Confessions, *supra*, at 35.
32. Christian A. Meissner & Saul M. Kassin, *"You're Guilty, So Just Confess!": Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, *in* Interrogations, Confessions, and Entrapment 85, 86 (G. Daniel Lassiter ed., 2004).
33. Miller v. Fenton, 474 U.S. 104, 107 n.2 (1985).

34. *Miranda*, 384 U.S. at 451 (quoting Fred E. Inbau et al., Criminal Interrogation and Confessions 40 (1962)).
35. *Id.* at 450.
36. *Culombe*, 367 U.S. at 574–75.
37. *See* Reik, The Compulsion to Confess, *supra*.
38. *Stein*, 346 U.S. at 185.
39. *See* Sigmund Freud, *The Dissection of the Psychical Personality*, *in* 22 Standard Edition 57 (1933/1964); Sigmund Freud, *The Ego and the Id*, *in* 19 Standard Edition 3 (1923/1961).
40. *See* Freud, *The Dissection of the Psychical Personality*, *supra*, at 62.
41. *See* Joseph Sandler & Anne-Marie Sandler, *The Past Unconscious, the Present Unconscious, and the Vicissitudes of Guilt*, 68 Int'l J. Psychoanalysis 331, 333 (1987).
42. *See* Melanie Klein, Envy and Gratitude and Other Works 1946–1963 (2002).
43. *See* Melanie Klein, Love, Guilt and Reparation and Other Works 1921–1945 (2002); Otto Kernberg, *Psychoanalytic Object Relations Theories*, *in* Psychoanalysis: The Major Concepts 450, 454 (Burness E. Moore & Bernard D. Fine eds., 1995).
44. Psychoanalytic Terms and Concepts 130 (Elizabeth L. Auchincloss & Eslee Samberg eds., 2012).
45. *See* Melanie Klein, *Notes on Some Schizoid Mechanisms*, 27 Int'l J. Psychoanalysis 99 (1946).
46. *See* Edith Jacobson, The Self and the Object World (1964).
47. Hans W. Loewald, *The Waning of the Oedipus Complex*, 27 J. Am. Psychoanalytic Ass'n 751 (1979).
48. *See* Freud, *The Dissection of the Psychical Personality*, *supra*, at 61.
49. Miller v. United States, 320 F.2d 767, 772 n.10 (D.C. Cir. 1963) (quoting Gregory Zilboorg, The Psychology of the Criminal Act and Punishment 50 (1954)).
50. Sigmund Freud, *The Economic Problem of Masochism*, *in* 19 Standard Edition 157, 166 (1924/1961).
51. Sigmund Freud, *Some Character-Types Met With in Psychoanalytic Work*, *in* 14 Standard Edition 309, 311 (1916/1957).
52. Schmeiser, *Punishing Guilt*, *supra*, at 323 (quoting Pollard v. United States, 282 F.2d 450, 460 (6th Cir. 1960)).
53. Freud, *The Economic Problem of Masochism*, *supra*, at 166.
54. Loewald, *The Waning of the Oedipus Complex*, *supra*, at 242.
55. *See* Sigmund Freud, *"A Child Is Being Beaten": A Contribution to the Study of the Origin of Sexual Perversions*, *in* 17 Standard Edition 175 (1919/1955).
56. *See id.*; *see also* Salman Akhtar, Comprehensive Dictionary of Psychoanalysis 166 (2009); Masochism: Current Psychoanalytic Perspectives 5 (Robert A. Glick & Donald I. Meyers eds., 1988).
57. *See* Freud, *The Economic Problem of Masochism*, *supra*, at 159; *see also* Akhtar, Comprehensive Dictionary, *supra*, at 184.

58. Psychoanalytic Terms and Concepts, *supra*, at 146.
59. *See* Bernhard Berliner, *The Role of Object Relations in Moral Masochism*, 27 Psychoanalytic Q. 38 (1958).
60. *See* Judith Herman, Trauma and Recovery: The Aftermath of Violence—from Domestic Abuse to Political Terror 40 (1997).
61. *See* Psychoanalytic Terms and Concepts, *supra*, at 273; Schmeiser, *Punishing Guilt*, *supra*, at 34 n.22.
62. Jessica Benjamin, The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination 61 (1988).
63. Leo, Police Interrogation, *supra* at 135.
64. *Miranda*, 384 U.S. at 451 (quoting Charles E. O'Hara & Gregory L. O'Hara, Fundamentals of Criminal Investigation 112 (1956)).
65. Leo, Police Interrogation, *supra*, at 138.
66. *Miranda*, 384 U.S. at 458 n.27.
67. *See* Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 Loy. L.A. Int'l & Comp. L. Rev. 257, 264 (2006).
68. Maimonides, The Book of Judges, *in* III Yale Judaica Series, The Code of Maimonides (Mishneh Torah), Book XIV The Book of Judges (Abraham M. Hershman ed., 1977).
69. *See* Norman Lamm, *The Fifth Amendment and Its Equivalent in the Halakhah*, 5 Judaism 53 (1956).
70. *Id.* at 56.
71. *Id.* at 57.
72. Garrity v. New Jersey, 385 U.S. 493 (1967).
73. *Id.* at 497 n.5 (quoting Norman Lamm, *The Fifth Amendment and Its Equivalent in Jewish Law*, 17 Decalogue 9, 12 (1967)).
74. *Id.*
75. *See* G. Daniel Lassiter & Christian A. Meissner, Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations 28, 42 (2010); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, J. Crim. L. & Criminology 88, 178 (1998).
76. *See* Christian Redlich & Christian Meissner, *Technique and Controversies in the Interrogation of Suspects*, *in* Psychological Science in the Courtroom 137 (Jennifer L. Skeem, Kevin S. Douglas & Scott O. Lilienfeld eds., 2009).
77. *See* Lassiter & Meissner, Police Interrogations, *supra*, at 12; Leo & Ofshe, *The Consequences of False Confessions*, *supra*, at 429.
78. *See* Brooks, Troubling Confessions, *supra*, at 6.
79. *See id.* at 23.
80. *See* Miller v. United States, 320 F.2d 767 (D.C. Cir. 1963).
81. *Id.* at 768, *see also* Schmeiser, *Punishing Guilt*, *supra*, at 318.

82. *Miller*, 320 F.2d at 770 n.5.
83. *Id.* at 767.
84. *Id.* at 772 (quoting Sigmund Freud, *Psycho-Analysis and the Establishment of the Facts in Legal Proceedings*, *in* 9 Standard Edition 97 (1906/1959)).
85. *See* Sigmund Freud, *The Interpretation of Dreams*, *in* 5 Standard Edition 339 (1900/1953).
86. Psychoanalytic Terms and Concepts, *supra*, at 95.
87. *See Miller*, 320 F.2d at 772.
88. *See* Psychoanalytic Terms and Concepts, *supra*, at 95.
89. *See* Brooks, Troubling Confessions, *supra*.
90. *See* Robert Horselenberg, Harald Merckelbach & Sarah Josephs, *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 Psych. Crime & L. 1, 6 (2003); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions*, 7 Psych. Sci. 125, 126 (1996).
91. *See* Lawrence Wright, *Remembering Satan—Part I*, The New Yorker, May 17, 1993, at 60; Lawrence Wright, *Remembering Satan—Part II*, The New Yorker, May 24, 1993, at 54.
92. Wright, *Remembering Satan—Part I*, *supra*, at 60.
93. *See* Gisli H. Gudjonsson, The Psychology of Interrogations, Confessions and Testimony 105 (1999).
94. *See* Wright, *Remembering Satan—Part II*, *supra*, at 76.
95. *Id.* at 61.
96. *Id.* at 76.
97. *Id.*
98. *Id.* at 60.
99. *See* Frazier v. Cupp, 394 U.S. 731 (1969); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979).
100. *See* Simon-Kerr, *Legitimacy and Deceptive Interrogations*, *supra*.
101. Illinois v. Perkins, 496 U.S. 292, 303 (1990) (Brennan, J., concurring) (quoting Miller v. Fenton, 474 U.S. 104, 116 (1985)).
102. Kassin & Kiechel, *The Social Psychology of False Confessions*, *supra*, at 127; *see* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 1000 (1997).
103. Wright, *Remembering Satan—Part I*, *supra*, at 71.
104. *See* Brooks, Troubling Confessions, *supra*, at 9.
105. *Id.* at 54.
106. Videotaping of interrogations may help to ensure that these tactics are not used, as well as overall to lessen the risk of false confessions. *See* Saul M. Kassin et al., *Police-Induced Confessions, Risk Factors, and Recommendations: Looking Ahead*, 34 L. & Hum. Behav. 49 (2010).
107. *Culombe*, 367 U.S. at 575.

5 Intimate Contracts

1. *See, e.g.*, Adoption and Assisted Reproduction: Families Under Construction (Susan Frelich Appleton & D. Kelly Weisberg eds., 2009).
2. Simeone v. Simeone, 581 A.2d 162, 172 n.2 (Pa. 1990) (Papadakos, J., concurring).
3. *See* Martha Ertman, Love's Promises: How Formal and Informal Contracts Shape All Kinds of Families (2015).
4. Cass Sunstein & Richard Thaler, Nudge: Improving Decisions About Health, Wealth and Happiness (2008).
5. *Simeone*, 581 A.2d at 163.
6. *Id.* at 165.
7. *Id.*
8. *Id.*
9. Crews v. Crews, 989 A.2d 1060, 1069 (Conn. 2010) (quoting Holly Hill Holdings v. Lowman, 628 A.2d 1298, 1302 (Conn. 1993)).
10. *See, e.g.*, In re Marriage of Shanks, 758 N.W. 2d 506, 512 (Iowa 2008).
11. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211 (1995); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectation of Divorce at the Time of Marriage*, 17 L. & Hum. Behav. 439 (1993).
12. *See* Sigmund Freud, *Instincts and Their Vicissitudes*, *in* 14 The Standard Edition of the Complete Psychological Works of Sigmund Freud 109, 139 (James Strachey trans. & ed., 1915/1957); Phyllis Tyson & Robert L. Tyson, *Development*, in Psychoanalysis: The Major Concepts 395, 403 (Burness E. Moore & Bernard D. Fine eds., 1995); *Ambivalence*, *in* Psychoanalytic Terms and Concepts 12 (Elizabeth L. Auchincloss & Eslee Samberg eds., 2012).
13. *See* Selected Melanie Klein (Juliet Mitchell ed., 1987).
14. *See id.*; Hans Loewald, Papers on Psychoanalysis (1980).
15. *See, e.g.*, Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J. L. & Fam. Stud. 1 (2003).
16. *See* chapter 2.
17. *See* June Carbone, *Reproductive Technologies*, *in* The Child: An Encyclopedic Companion 876 (Richard A. Shweder et al. eds., 2009).
18. Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 L. & Contemp. Probs. 109, 139 (2009).
19. *See, e.g.*, Ark. Code Ann. § 9–10–201 (2016); Fla. Stat. Ann. § 63.212(1)(h) (2016); 750 Ill. Comp. Stat. Ann. § 47 (2009); Nev. Rev. Stat. § 127.287(5) (2015); *see also* The Uniform Parentage Act, §§ 801–9 (Nat'l Conf. Commrs. Uniform State Laws 2002), 9B U.L.A. 58–63 (Supp. 2011).
20. Some contract provisions might be held to be against public policy or unconstitutional, such as provisions giving the intending parents the right to compel the surrogate to have an abortion.

21. J.F. v. D.B., 879 N.E.2d 740, 741 (Ohio 2007).
22. *See* Raftopol v. Ramey, 12 A.3d 783, 786 (Conn. 2011).
23. Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. of Soc. Issues 21, 31 (2005).
24. Johnson v. Calvert, 851 P.2d 776, 785 (Calif. 1993) (en banc).
25. Scott, *Surrogacy and the Politics of Commodification*, *supra*, at 141.
26. *See id.* at 139.
27. *See* Susan Fischer & Irene Gillman, *Surrogate Motherhood: Attachment, Attitudes, and Social Support*, 54 Psychiatry 13 (1991).
28. *See* Paul V. Trad, *Adaptation to Developmental Transformations During the Various Stages of Motherhood*, 19 J. of Am. Acad. Psychoanalysis 403, 404 (1991).
29. *See id.* at 405.
30. *See* Barbara Almond, The Monster Within: The Hidden Side of Motherhood (2011).
31. Ciccarelli & Beckman, *Navigating Rough Waters*, *supra*, at 30.
32. *See id.*
33. Fischer & Gillman, *Surrogate Motherhood*, *supra*, at 17.
34. *See* M. Masud R. Khan, The Privacy of the Self: Papers on Psychoanalytic Therapy and Technique 42 (1974).
35. Fischer & Gillman, *Surrogate Motherhood*, *supra*, at 14.
36. *See* Handbook of Attachment: Theory, Research, and Clinical Applications (Jude Cassidy & Phillip R. Shaver eds., 2d ed., 2010); Arietta Slade, *The Development and Organization of Attachment: Implications for Psychoanalysis*, 48 J. of Am. Med. Ass'n 1147 (2000).
37. *See* Mary Target, *Attachment Theory and Research: A Bridge from Psychoanalysis Joining Normal and Abnormal Development*, *in* The American Psychiatric Publishing Textbook of Psychoanalysis 159 (Ethel S. Person et al. eds., 2005); Lori B. Andrews, Between Strangers: Surrogate Mothers, Expectant Fathers, and Brave New Babies (1989).
38. Ciccarelli & Beckman, *Navigating Rough Waters*, *supra*, at 32.
39. *Johnson*, 851 P.2d at 778.
40. *See* Target, *Attachment Theory and Research*, *supra*, at 163.
41. Lisa J. Cohen et al., *The Psychology and Psychopathology of Pregnancy: Reorganization and Transformation*, *in* Handbook of Infant Mental Health 20, 27 (Charles H. Zeanah, Jr., ed., 2d ed., 2000).
42. *Id.* at 28.
43. *See* Scott, *Surrogacy and the Politics of Commodification*, *supra*, at 138.
44. *See, e.g.*, Gonzales v. Carhart, 530 U.S. 124 (2000); *see also* Susan Frelich Appleton, *Reproduction and Regret*, 23 Yale J.L. & Feminism 255 (2011).
45. *See* Scott, *Surrogacy and the Politics of Commodification*, *supra*, at 139.

46. J.F. v. D.B., 879 N.E.2d, 740 (Ohio 2007); *see* Robert E. Rains, *What the Erie "Surrogate Triplets" Can Teach State Legislatures About the Need to Enact Art. 8 of the Uniform Parentage Code (2000)*, 56 Clev. St. L. Rev. 1, 4–5 (2008).
47. Rains, *What the Erie "Surrogate Triplets" Can Teach State Legislatures*, *supra*, at 10.

6 Violent Threats

1. There are important exceptions. For example, the doctrine of "true threats" in First Amendment law requires juries to determine whether the defendant's words were *really* a threat, and therefore punishable, as opposed to something else: a joke, hyperbole, or an innocuous turn of phrase. *See* Elonis v. United States, 135 S.Ct. 2001 (2015); Watts v. United States, 394 U.S. 705, 708 (1969).
2. Towne v. Eisner, 245 U.S. 418, 425 (1918).
3. *See* chapter 2.
4. Susanna Blumenthal documents how lawyers, courts, and scholars well before Holmes struggled with the adjudication of states of mind. *See* Susanna Blumenthal, Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture (2016).
5. Tarasoff v. The Regents of the University of California, 551 P.2d 334, 340 (Cal. 1976).
6. *Id.*
7. Douglas Mossman, *Critique of Pure Risk Assessment or, Kant Meets* Tarasoff, 75 U. Cin. L. Rev. 523, 526 (2006).
8. *See* People v. Poddar, 518 P.2d 342 (Cal. 1974).
9. *See* Paul B. Herbert, *The Duty to Warn: A Reconsideration and Critique*, 30 J. Am. Acad. Psychiatry & Law 417 (2002).
10. *See id.*
11. *See* Brian Ginsburg, Tarasoff *at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. of Contemp. Health L. & Pol'y 1, 3 (2005).
12. *See Tarasoff*, 551 P.2d at 341; Mossman, *Critique of Pure Risk Assessment*, *supra*, at 533.
13. *See* Herbert, *The Duty to Warn*, *supra*, at 418.
14. *See* George J. Annas, *When Must the Doctor Warn Others of the Potential Dangerousness of His Patient's Condition?*, 3 Medicolegal News 1, 1 (1975); *Tarasoff*, 551 P.2d at 341.
15. *See* Annas, *When Must the Doctor Warn Others?*, *supra*, at 1.
16. *See* Mossman, *Critique of Pure Risk Assessment*, *supra*, at 533; Ginsburg, Tarasoff *at Thirty*, *supra*, at 4.
17. *See* Ann Hubbard, *Symposium Introduction*, 75 U. Cin. L. Rev. 429, 429–30 (2006); Paul B. Herbert & Kathryn A. Young, Tarasoff *at Twenty-Five*, 30 J. Am. Acad. Psychiatry & Law 275, 277 (2002).

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20. *Tarasoff*, 551 P.2d at 354 (Mosk, J., dissenting).
21. *See* Herbert, *The Duty to Warn*, *supra*, at 421.
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45. Ralph E. Roughton, *Useful Aspects of Acting Out: Repetition, Enactment, and Actualization*, 41 J. Am. Psychoanalytic Ass'n 443, 458 (1993).
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7 Sexual Choice

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4. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1395 (2013).
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86. *Love*, 459 N.W.2d at 700.
87. *Id.*
88. Freud, *Observations on Transference-Love*, *supra*, at 162.
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94. *See Love*, 459 N.W.2d at 701–2.
95. *Id.* at 701; *see also L.L.*, 362 N.W.2d at 177 ("It is through the creation, experiencing and resolution of these feelings that [the patient] becomes well.") (quoting Donald J. Dawidoff, The Malpractice of Psychiatrists: Malpractice in Psychoanalysis, Psychotherapy, and Psychiatry 6 (1973)).
96. *Love*, 459 N.W.2d at 701.
97. *Benavidez*, 177 F.3d at 930.
98. Courts have understood this. *See Simmons*, 805 F.2d at 1365. As one court explained, "[t]ransference is crucial to the therapeutic process because the patient 'unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed toward his own parents.'" *L.L.*, 362 N.W.2d at 177 (quoting Dawidoff, The Malpractice of Psychiatrists, *supra*, at 6). The Pennsylvania Supreme Court also recognized that transference occurs "when a therapist encourages a mental health patient to 'displace' feelings regarding other figures in the patient's life, often parents, onto the therapist." *Thierfelder*, 52 A.3d at 1269.

99. Sexual Exploitation in Professional Relationships xi (Glen O. Gabbard ed., 1989).
100. *Simmons*, 805 F.2d at 1365.
101. Freud, *Observations on Transference-Love*, *supra*, at 162.
102. *Love*, 459 N.W.2d at 701; *see also* McNicholes v. Subotnik, 12 F.3d 105, 106 n.3 (8th Cir. 1993).
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104. *See* Howard B. Levine, *Sexual Boundary Violations: A Psychoanalytic Perspective*, 26 British J. of Psychotherapy 50 (2010).
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106. *See* Levine, *Sexual Boundary Violations*, *supra*, at 57.
107. *See* Ethical Principles of Psychologists and Code of Conduct § 10.05.
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109. *See* T. Byram Karasu & Sylvia R. Karasu, *Psychoanalysis and Psychoanalytic Therapy*, *in* 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2746 (Benjamin J. Sadock et al. eds., 9th ed., 2009).
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113. *Id.*
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115. *Id.* at 1275.
116. Model Rules of Prof'l Conduct R. 1.8(j) cmt. 17 (2013).
117. *Thierfelder*, 52 A.3d at 1277.

8 Children's Rights

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2. Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. Davis L. Rev. 255, 256 (1979).
3. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).
4. *Id.* at 203.
5. At age twelve, Joshua was adopted by a couple who cared for him for the rest of his life. *See* Linda Greenhouse, *The Supreme Court and a Life Barely Lived*, N.Y. Times (Jan. 7, 2016), http://www.nytimes.com/2016/01/07/opinion/the-supreme-court-and-a-life-barely-lived.html.
6. *DeShaney*, 489 U.S. at 196.

7. *Id.* at 199–200.
8. The dissent made a powerful argument that, given the history of child welfare involvement in the family, the state "effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home." *Id.* at 210 (Brennan, J., dissenting).
9. *See* John Demos, *The American Family in Past Time*, 63 Am. Scholar 422, 428 (1974).
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11. *See* Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1988); *see also* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
12. *See* Tom D. Campbell, *The Rights of the Minor: As Person, as Juvenile, as Future Adult*, 6 Int'l J.L. Pol'y & Fam. 1, 6 (1992).
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18. The Moral and Political Status of Children 5 (David Archard & Colin M. Macleod eds., 2002).
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20. *In re Gault*, 387 U.S. at 13.
21. *See id.*; *Tinker*, 393 U.S. at 506.
22. *See Tinker*, 393 U.S. at 506.
23. *See Bellotti*, 443 U.S. at 633.
24. *See* Roper v. Simmons, 543 U.S. 551 (2005); Lee v. Weisman, 505 U.S. 577 (1992); Parham v. J.R., 442 U.S. 584 (1979).
25. *Parham*, 442 U.S. at 602.
26. Ginsberg v. New York, 390 U.S. 629, 642 n.10 (1968).
27. *Id.* at 649–50 (Stewart, J., concurring).

28. *Bellotti*, 443 U.S. at 636.
29. *Id.* at 635.
30. *Id.* at 637 n.15.
31. *Parham*, 442 U.S. at 603.
32. Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988).
33. *Id.*
34. *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring).
35. *Pierce*, 268 U.S. at 534–35; *see also* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); *Meyer*, 262 U.S. at 399.
36. Troxel v. Granville, 530 U.S. 57, 65 (2000).
37. *Thompson*, 487 U.S. at 825 n.23.
38. *Parham*, 442 U.S. at 602.
39. *See* David Archard, *Free Speech and Children's Interests*, 79 Chi.-Kent L. Rev. 83, 91–93 (2004).
40. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
41. Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483 (1954); *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
42. Plyler v. Doe, 457 U.S. 202, 221 (1982).
43. In re Gault, 387 U.S. at 17.
44. Schall v. Martin, 467 U.S. 253, 265 (1984) (emphasis added).
45. Object Relations in Psychoanalytic Theory 135 (Jay R. Greenberg & Stephen A. Mitchell eds., 1983).
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52. *See* Winnicott, The Maturational Process, *supra*, at 145–48.
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